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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. [illegible]

TWENTIETH CENTURY-FOX FILM CORPORATION, *Petitioner*,

v.

PAUL C. [illegible], ET AL., *Respondents*.

On Petition for Writ of Certiorari to the [illegible] Court of Appeals for the [illegible] Circuit

Respondents' Brief in Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

No. 980

TWENTIETH CENTURY-FOX FILM CORPORATION, *Petitioner*

vs.

PAUL C. TEAS, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Respondents' Brief in Opposition

Respondents, in opposing the writ sought, with deference first say that the petition and presentment which has been made to this Court, in an effort to show that the trial court did not have jurisdiction over the subject matter of this suit, does not accurately describe either the claims in suit or relief sought and granted in a diversity action brought only against petitioner as defendant below on its simple personal promise in a "joint and several" contract to pay money—of a transitory nature by logic, hoary precept and under decisions in all states—in which the courts below have entered judgment awarding and affirming only an *in personam* judgment against such defendant.

To what purpose would respondents have anywhere sued Twentieth Century to establish an interest in California real estate in which Twentieth had no title or interest either at the time the contracts were made in 1943 or afterwards?

Respondents unequivocally deny petitioner's assertion that by the established decisional law of California—or, for that matter, by any applicable California case—the contract obligation sought to be enforced in this suit against petitioner constituted or created an interest in real property.

With respect to petitioner's second ground, which charges the trial court with "an abuse of discretion so marked as to warrant the exercise by this Court of its power of supervision," respondents reject petitioner's factual premises and recital as being inaccurate and incomplete and as being upon a subject fully developed and heard at length by the trial court, which resolved any dispute by its findings against petitioner on this procedural matter; and after the Court of Appeals, with a 355-page record plus 21 exhibits of that full hearing before it, has declared it has discovered no indication that the District Court abused its discretion in refusing to transfer.

Opinions Below

1. Opinion of Court Appeals reported 286 F. 2d 373.

2. Opinion of District Court upon merits reported 178 F. Supp. 742.[1]

Its "letter opinion" denying petitioner's motion to

[1]District Court's later "Findings of Fact and Conclusions of law" entered prior to judgment appear R. 148-204.

dismiss appears R. 64.[2] Its "opinion" denying petitioner's motion to transfer (R. 86) (actually the trial court's remarks from the bench at the end of a two-day hearing on the facts concerning that issue, at the conclusion of which the court denied the motion[3] and later entered a formal order, R. 90, in which the court expressly found "for the plaintiffs on the facts").

Jurisdiction

The jurisdictional requisites for filing the petition for certiorari are adequately set forth in the petition. That such grounds exist as set out in the petition (p. 2 "Jurisdiction") under which the exercise of jurisdiction by this Court is invoked is challenged.

The basis for Federal jurisdiction in the court of first instance will be later shown.

Questions Presented

1. In deciding that respondents' claim against petitioner to establish and enforce the promise of petitioner as a joint and several[4] obligor in a written contract to pay[5] sums of money, measured by a specified

[2]Order overruling such motion when heard on the pleadings and affidavits (R. 83-4). Such motion was again heard and overruled at the conclusion of the trial when all facts had been fully developed. District Court's "Findings of Fact and Conclusions of law" on petitioner's motion to dismiss (R. 70-81), readopted after the full trial (R. 180).

[3]As appears in the court reporter's complete transcript of such hearing on motion to transfer, which was part of the record before the Court of Appeals although not printed and is now before the Supreme Court after certification by the Court of Appeals on motion of respondents under Rule 21, par. 6.

[4]"Second Parties jointly and severally agree to pay First Party, its successors or assigns" (R. 1756).

[5]". . . payable on or before the 20th day of the second calendar month following the month" during which the lessor was paid by any lessee (R. 1757).

fraction of certain proceeds[6] which might be thereafter received by a third party lessor under an oil and gas lease in which petitioner had no interest and covering lands in California *not* owned by petitioner either at the time of the contract, at the time of leasing, or at the time of suit or trial, was a claim seeking to declare and enforce a purely personal obligation and was not one for an interest in the California real estate, did the Court of Appeals thereby decide a question of California law contrary to and in conflict with the established law of such state as determined by its courts in applicable decisions?

2. Since this was an "episodic" suit requiring the proper interpretation of the unique terms of particular written contracts,[7] in which the courts below were required to determine the apparent *intention* of the parties from the language of the writings as examined in the factual setting in which they were made and to consider the position of the parties at the time and the objectives sought to be attained, and it having been determined by both of such courts *inter alia* that *as a matter of fact* as well as of law it was the *intention* of such parties in making and entering into such contracts to only create a personal obligation on the part of Twentieth Century to thereafter pay money, with no *intention* that the promisees should have any inter-

[6]". . . an amount equivalent to fifty per cent (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties, as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases) paid as consideration for making and entering into any lease" (R. 1756).

[7]Such contracts also contained *express* provisions under which promisors could be relieved on such joint and several personal covenants to pay money if the owner of the land should give a deed to promisees according to a form fully set out therein (R. 1759), which, if executed and delivered, *would* have had the effect of creating in respondents an interest in the real estate, but this was never done.

est in the real estate, and since the nature of the claims in suit and relief sought and granted in the courts below, as shown by the complaint and decree, was purely *in personam*, has the Court of Appeals decided an important state question in a way in conflict with California law applicable to the particular facts of and claims in the instant case as will be considered under Supreme Court Rule 19-1(b) as interpreted and applied by this Court?

3. Has the Court of Appeals, in affirming the trial court's judgment, so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the trial court, which exercised its discretion to deny a motion to transfer under Section 1404(a), as to require this Court to now exercise its supervisory powers in such a case as this, where the record affirmatively shows that (1) the trial court conducted a two-day hearing on petitioner's motion to transfer[8] and resolved all factual disputes in favor of respondents[9]; and (2) the Court of Appeals, with the complete record of such hearing before it[10], fully considered and rejected petitioner's charge of abuse of discretion, and held that there was no indication that the District Court failed to give consideration to the convenience of the parties and the witnesses and the interest of justice, as required by the statute?

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[8]With a record of 2 volumes, totaling 355 pages, plus 21 exhibits offered by respondents.

[9]Movant in support of its burden to show that the cause should be transferred relied upon an affidavit which was so discredited by all other evidence at the hearing that the trial judge observed that "stating it most liberally," such affidavit is "very badly crippled" when considered "in the light of all the other circumstances of the case" (R. 88).

[10]Which was part of the appellate record although petitioner did not see fit to have it printed on appeal or to file it with this Court in support of petitioner's charge of abuse of discretion, but which record, in its original form, has been certified up to this Court at the request of respondents.

STATEMENT

Respondents as plaintiffs below brought this suit in April of 1958 as a transitory action based on diversity of citizenship in the United States District Court for the Northern District of Texas. Respondents were citizens and residents of Texas, California, New York and New Jersey. Petitioner was a corporation organized under the laws of the State of Delaware with its principal place of business in New York and with a permit to do business in the State of Texas and a registered agent for service in Dallas, within the Northern District of Texas. The amount in controversy, exclusive of interest and costs, exceeded the then requisite sum of $3,000.00.

Respondents as successors in interest to the original corporate promisees in the two April 15, 1943 contracts (P. Ex. 15, R. 292, 1726 and P. Ex. 16, R. 297, 1754) sued only Twentieth Century (corporate successor to the New York corporation of the same name) on its "joint and several" promise appearing in such contracts (R. 1737, 1740 and 1756) to thereafter pay to promisees "an amount equivalent to fifty per cent (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties, as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases)" which might be thereafter "paid as consideration for making and entering into any lease" by any lessee to lessor in the course of anticipated leasing for oil and gas of certain California lands referred to.

The record shows that in 1943, when the contracts were made, and at all subsequent times neither peti-

tioner nor its corporate predecessor had any title to or interest in any of the lands or minerals referred to in such contracts.

Claims and Relief Sought As Shown in Complaint

The complaint sought "a determination of Defendant's true obligation and duties toward Plaintiffs then and thereafter owed" (R. 93) arising under such 1943 contracts. After alleging (R. 94-99) the facts and circumstances which led up to and formed the setting for such contracts on April 15, 1943 and the terms and provisions of such contracts, such complaint described and quoted the language of the important "joint and several" promise of defendant contained in each of such contracts (as set out in the second preceding paragraph of this "Statement") (R. 101, 102) and alleged that, in consideration of such promises, promisees were then induced to surrender all of their former rights and restrictions on the title with respect to the mineral estate as reserved in earlier conveyances, and also to agree to convey the Northeast Tract (Parcel 3) in fee to petitioner's subsidiary, Fox Realty Corporation of California (R. 103), and that pursuant to such contract a deed absolute was thereafter given (R. 104).

The complaint then went on to allege the later leasing events which culminated in the lease dated March 22, 1952, which was given to Universal Consolidated Oil Company by such subsidiary corporation covering all of such lands, in which lease the 50% net profits interest was created (R. 106-7).

The prayer was that plaintiffs have appropriate judicial declarations made "with respect to Plaintiffs'

right to receive from and be paid by the Defendant herein the cash equivalent of 1/2 of any proceeds which may be hereafter paid . . . on account of the 50% net profits provisions contained in such lease, and that this Court determine and declare the true meaning and construction of Plaintiffs' rights under such 1943 agreements and contracts as against the Defendant herein and the extent of its obligations and covenants thereunder" (R. 112-113).

Relief Accorded in the Decree

By par. 1 (R. 205) of such decree it was provided:

> "1. This Court has jurisdiction of the parties and subject matter of this suit, and such suit is not one for land or any interest therein, but is to establish, enforce and declare the joint and several promises and obligations of defendant's corporate predecessor undertaken as promisor in the contracts sued on, the performance of which defendant assumed toward plaintiffs and involuntary plaintiffs; and Fox Realty Corporation of California (a wholly owned subsidiary of defendant and its predecessor), a joint and several obligor under said contracts, is not an indispensable party defendant to this suit."

By par. 4 (R. 206) of such decree is was provided:

> "4. That plaintiffs and involuntary plaintiffs do have and recover from defendant judgment which hereby determines, fixes and declares the rights of such plaintiffs and involuntary plaintiffs arising under the contracts sued on to be hereafter paid by the defendant, and the duty, obligation and requirement of such defendant under such contracts to hereafter pay to such plaintiffs

> and involuntary plaintiffs, and each of them, according to their respective interests and percentages as hereinafter shown, sums and amounts equivalent to fifty percent (50%) of any and all sums and amounts whatever which may be hereafter received either by or for the credit or benefit of such defendant or its subsidiary, Fox Realty Corporation of California, as lessor, in that certain oil and gas lease dated March 21, 1952, made and entered into with Universal Consolidated Oil Company, as lessee (or which may be hereafter paid, credited or received by or between any successor or assign of such companies), on account of or under those provisions of such lease which provide for the payment by such lessee to lessor of a 50% net profits interest and which is referred to therein as being a 'variable participating royalty.'"

By par. 7 (R. 209) it was expressly provided that the rights of plaintiffs "to be paid and defendant's obligations to make such payments as adjudged and declared in paragraph 4 . . . shall arise and become due and payable on or before the 20th day of the second calendar month following the month in which payments in money shall be made by such lessee" to Fox Realty Corporation of California as lessor (conforming with the provisions of the 1943 contracts, R. 1741 and 1757, and as alleged in the complaint, R. 101 and 103).[11]

[11] In respondents' "Statement" we omit any reference to the first promise made in these contracts to pay an amount equivalent to 8-1/3% of the proceeds of all production because not sued for an not in dispute. In describing the complaint and decree we have also omitted any reference to respondents' claim that petitioner's obligation to pay extended to "amounts equivalent to" 50% of the 3-1/3% by which the 11-2/3% "lessor's royalty" exceeded 8-1/3%, because although allowed in the trial court, the Court of Appeals reversed the judgment below to that extent.

Respondents' Direct Challenge of Certain Statements in the Petition

Nowhere in such complaint did respondents make any claim to an "interest in the proceeds from California oil and gas production," and neither of the courts below "decided" that such a "claim" was "not an interest in real property," as pretended in the first question presented by petitioner at p. 2 of such petition.

Contrary to further statements of petitioner in its "Statement of the Case":

There was no claim asserted by respondents "to a portion of the proceeds derived from the production of oil and gas on certain real property located in Los Angeles, California" (p. 4); there was no judgment of the District Court "awarding them (respondents) one-half of the variable participating royalty," as stated in the petition (p. 9); the Court of Appeals did not affirm any "District Court's award to respondents of one-half of the variable participating royalty," as the petition states (pp. 9-10).

There was no "real property affected by this action," which is stated as a fact in the petition (p. 5). The further statement in the petition (p. 7) that "the lease contained no provision for the payment of 'bonus' or 'rentals'" is only correct to the extent that the lease did not so label them. Both courts below found on the basis of evidence presented in the trial court that the net profits interest, labeled a "variable participating royalty"[12] in the lease, was a bonus; the Court

[12]Such term, then unknown in the California oil industry, was coined at the time the lease was drawn for the purpose among others of securing a tax advantage (R. 1427, 1428), and at about the same time when in

of Appeals opinion holding:

> "Such external evidence clearly supports the finding that the variable participating royalties are bonus payments." (286 F. 2d 373, 378).

The evidence before the trial court included the facts and circumstances under which the terms of the bids for the lease were controlled to specify the types of consideration to be given (R. 195), and that neither respondents nor their predecessors were ever consulted or advised concerning the making of any lease, and a short form of the lease was recorded so as to not disclose the consideration which lessee had agreed to give (R. 194, 195).

There was also extensive evidence of custom and usage (invited by the writings) on the meaning of leasing terms in the industry, upon which the trial court found as a fact:

> "The 'net profits interest' such as was provided in the 1952 lease to Universal Consolidated Oil Company was a 'bonus' under these 1943 contracts" (R. 190).

and that petitioner and its predecessor had full knowledge of such industry meaning of leasing terms through its "oil adviser" who was in its employ from 1942 continuously until after the lease was given (R. 192).

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the course of drawing such lease Clay, the attorney for lessee Universal, and Alfred Wright (the attorney for petitioner and its subsidiaries and an officer of Fox Realty and who had in 1943 with assistance of their "oil adviser" drawn the final 1943 contracts) were consulting as to the character of rights conferred on promisees in such 1943 contracts, and both such Califorina lawyers then agreed that only a personal "contract right" was given, and that such instruments clearly indicated "they were not royalty interests" (R. 1420, 1421, 1433).

Contract Setting as Found Below

As expressly found by the trial court,[13] prior to April 15, 1943, when these contracts were made, respondents' predecessors in right, who had once owned the whole 286 acres, had by successive deeds conveyed all but the northeast 89 acres (Parcel 3) by deeds (some with clauses for reverter and reentry) containing not only restrictions, reservations and conditions against drilling but also against development of any part of the mineral estate thereunder; and, when the deed with like restrictions and clauses was given to the southeast tract in 1936, under a contemporaneous contract it was, in addition, provided that if grantors or their successors should thereafter be called on to surrender said restrictions, "they would become entitled to one-half of any production in kind and to one-half of any proceeds therefrom" (R. 70); viz., 1/2 the minerals.

Such 1936 conveyance subject to the restrictions and contract mentioned was to Fox-Pico Corporation, another wholly owned subsidiary of petitioner's predecessor, and the title to this southeast tract so burdened was owned by it when the April 15, 1943 contracts were made, under the terms of which it became one of the "joint and several" promisors. (In December 1943 Fox-Pico deeded such tract to Fox Realty Corporation of California, and grantor was dissolved the next day, R. 74).

The west tract, which had been deeded to petitioner's predecessor in 1924 subject to the title restrictions mentioned, was in 1927 conveyed by it to Fox

[13]Findings of Fact on defendant's motion to dismiss, R. 70-79; readopted after trial on the merits, R. 180.

Realty Corporation of California, and which tract was owned by it thenceforth (R. 74).

The remaining northeast 89-acre tract, which was agreed to be conveyed to Fox Realty Corporation of California by the contract of April 15, 1943 (which was subject to an outstanding oil and gas lease which was also assigned) was thereafter deeded pursuant to such agreement (R. 71, 74).

As found by the District Court at the time such motion to dismiss was first presented and denied (R. 71), and by the court's later findings after the case was tried on the merits (R. 182, 185, 190, 195), the promisees in these 1943 contracts were required to and did surrender all of their former substantial respective titles and rights, both legal and equitable, in these lands and minerals in return for a joint and several promise in the form of a personal covenant that they would thereafter be paid amounts equal to and measured by specified fractions of lessor's receipts from future leasing for oil and gas.

Excerpts from the Contracts Exhibiting a Purely Personal Promise to Pay Money

The important obligation appears in the following language:

> "Beginning with the date of this agreement and continuing until there has been conveyed to First Party, its successors or assigns, eight and one-third per cent (8-1/3%) of the oil and mineral rights . . . in the manner described in paragraph 12 hereof, Second and Fourth Parties, jointly and severally, agree . . . to pay to First Party an amount equivalent to fifty per cent

> (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases) paid as consideration for making and entering into any lease." (R. 1737, 1740)

such contracts also providing that:

> "Any bonus payments herein provided for shall be paid on or before the 20th day of the second calendar month following the month in which said bonus payments are paid to the Second, Third or Fourth Parties, their successors or assigns." (R. 1741-2).

The contracts further provided:

> "12. The obligations of Second Party, Third Party and Fourth Party to pay to First Party, its successors or assigns . . . shall . . . cease and terminate . . ."

upon a deed being given to promisees according to a form fully set out therein (R. 1743).[14]

Except for a recital (R. 1748, 1763) that if payments should be made by depositing such sums to the credit of promisees at a named Los Angeles bank such would constitute compliance, no place of payment was fixed in these contracts.

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[14]The references above are to P. Ex. 15 (R. 292, 1726), which is the Fox Hills Realty Company contract, and parallel references to like language in the contract with Janns Investment Corporation appear P. Ex. 16 (R. 297, 1754 at R. 1756-58).

Other Pertinent Findings of Fact By the Trial Court on Motion To Dismiss

By an express finding of the trial court:

> "Such personal covenants by the written contracts of April 15, 1943, as undertaken and promised by Twentieth Century-Fox Film Corporation, and its wholy owned subsidiaries, were not 'joint' but were 'joint and several' and imposed a distinct and separate obligation on Twentieth Century-Fox Film Corporation and defendant as its successor." (R. 72).

The trial court further found that each of the parties who united in making the promises contained in these 1943 contracts received some benefit in consideration of it (R. 73). It further found as a fact that:

> "Plaintiffs' suit is not for land, nor any interest therein. Plaintiffs are neither assignees nor grantees under either assignments or deeds to any interest in the land or in the minerals therein. Plaintiffs are neither 'royalty owners' nor owners of any other mineral estate in the land. No rescission or cancellation is sought, and no lien is asserted or sought to be foreclosed."

and further that plaintiffs did not seek to divest any title or to attack the validity of the 1952 lease to Universal (R. 73). As further found by that court, plaintiffs "seek no relief against Fox Realty Corporation of California," and that such company was "not an indispensable party defendant" in such action, and that any decree which might be entered for plaintiffs "would not directly and adversely affect it; and a decree can be so framed as to leave it unaffected."

A Further Statement on the Denial of Petitioner's Motion to Transfer And Its Affirmance

On this phase of the case, Petitioner, having sought to short-cut the facts, record and all findings against it, must assume full responsibility for prolonging this response in order to make an accurate presentment.

After the trial court heard and overruled petitioner's motion to dismiss June 14, 1958 (R. 83), and two days after the case was called for a setting for trial on the merits,* the trial court conducted a two-day hearing on petitioner's motion to transfer, beginning August 4, 1958, and which resulted in a 355-page record plus respondents' 21 exhibits.

Petitioner's motion to transfer was couched only in the formal language of the Act of May 24, 1949, c. 139, §81, 63 Stat. 101 (28 U.S.C. §1404(a)) (R. 85), and at such hearing petitioner referred to an affidavit attached which it read into the record (Vol. 1, p. 9 R.M.T.**).

At such hearing respondents called four witnesses in addition to offering numerous affidavits, documents, copies of tables from the "Annual Report of the Director of the Administrative Office of the United States Courts" dated September 1957, and part of the Record of hearings before the Subcommittee of the

*At which docket call plaintiffs below requested such a setting on September 15, 1958, being one of two weeks with open dates for trial, but on objection and request for delay by defendant, the case was not set. (Record on Motion to Transfer, Vol. 2, pp. 64-5, 235-6).

***Note: All "R.M.T." references hereafter in this brief are to court reporter's original typewritten transcript of such hearing in two Volumes, which was part of the record before the Court of Appeals; although not printed (except court's oral ruling from bench at conclusion of such hearing, R. 86), and is now before the Supreme Court after cerification by the Court of Appeals on motion there of Respondents under Rule 21, par. 6.*

Committee on Appropriations, U. S. House of Representatives, 85th Congress, First Session, later referred to.

On appeal, petitioner did not designate any of such record and exhibits for printing with the exception already noted of the "Opinion" (R. 9, Item 5); and in Appellant's Brief in the Court of Appeals none of its five points of "Argument" were on the denial of the motion to transfer, although appellant's "Specification of Error" (No. 22) assigned such denial as error; and respondents in Appellees' Brief in answer to such specification presented separate Argument to affirmatively show that the trial court had *not* abused its discretion and supported same by references to such unprinted record.

The Court of Appeals, (which petitioner now charges has "sanctioned a radical departure from accepted standards of judicial procedure" such as to "call for an exercise of this Court's power of supervision,") despite the fact that such court had held in other cases that under its own Rules a matter not argued in a brief on appeal might be disregarded by that court,* nevertheless proceeded to fully consider and dispose of appellant's unsupported specification in its opinion (286 F. 2d at p. 380).

Now, in a petition for writ of certiorari in its ground (2) for invoking the jurisdiction of this Court (p. 2) and in its third "Question Presented" (p. 3) petitioner asks this Court to accept as true an unsupported, inaccurate and incomplete factual predicate and to conclude that both lower courts have been guilty of a gross abuse of discretion without anywhere

*Sumbeam Corp. v. Masters of Miami, 225 F. 2d 191, 192-3.

under its "Statement of the Case" (pp. 4-10) making a statement of the "facts material to the consideration of the question presented," as required by Supreme Court Rule 23-1(e), and without giving or referring to the facts as developed at the two-day hearing in the trial court on the motion to transfer. The only reference in such "Statement" as to what happened on the motion to transfer is a recital that such motion was filed, denied and affirmed on appeal coupled with an incomplete and unfair conclusion that:

> "Respondents resisted the motion principally on the ground that the matter could be brought to trial more rapidly in the Northern District of Texas and that few witnesses would be needed at the trial." (p. 9).

Thereafter under a heading "Reasons for Granting the Writ" in paragraph 3 (pp. 17-23) petitioner's argument proceeds upon an assumed state of facts concerning the convenience of witnesses and parties and the interests of justice with no review of the facts adduced or references to the record made before the trial court. In such uninhibited argument petitioner mentions none of the conflicts in the evidence, all of which were resolved against it by the findings of the trial court in its order denying the motion to transfer (R. 90):

> *"The court finds for the plaintiffs on the facts."*

Such presentment instead seeks to discredit the remarks of the trial court made extemporaneously from the bench at the conclusion of the lengthy hearings and makes the unwarranted charge that the trial judge did not properly consider the factors enumerated in 1404(a) (petition, pp. 20-2).

A Summary of the Record Made Of The Hearing on Motion to Transfer

1. Petitioner's affidavit which was contradicted and impeached.

The supporting affidavit attached to the motion to transfer was essentially based on (1) convenience of witnesses as named therein, (2) convenient access to records, and (3) that in order to try the case the court would need to "view the California lands involved."

It was stated by affiant that he had "personally interviewed or caused to be interviewed under my direct supervision" witnesses thereafter named with specified addresses, and that all lived in Los Angeles or its environs, and that "said California residents will not voluntarily . . . go to Texas" to testify.

The affidavit in par. 6 then listed three witnesses, F. L. Metzler, Edna Hollister, and Marie Chester, asserting that each had "participated in such negotiation, drafting and discussions" when the *1943* contracts were drawn (although admitting in par. 5 that Metzler was still an employee of petitioner and "has said that he is willing to go to Texas if requested to do so by the defendant.").

In par. 7 petitioner listed Joseph Jensen, John E. Clay, and C. J. Williams as being needed to offer testimony relating to events occurring *after* the *1952* lease was given to Universal by Fox Realty to establish that respondents' predecessors knew of the lease and of payments made thereunder and "acquiesced" in petitioner's interpretation of said contracts.

Paragraph 8 listed the names of 13 additional witnesses (and repeated 2 of those listed in par. 7) as being needed to testify that the lease to Universal was (1) made "in good faith" and (2) was not designed "to circumvent any proper obligation to plaintiffs" and (3) that Universal's offer to lease was "the best and fairest of all such inquiries and offers." (All such matters related to events in 1951, eight years *after* the contracts were made.)

The names of the witnesses which affiant swore *had been interviewed* and who were stated to have "personal knowledge" of the matters described in par. 8 were: William M. McDuffie, George Thompson, Frank Long, L. W. Frankley, Harold W. Hoots, Frank Morgan, Paul Milliken, Harold C. Morton, Chester F. Dooley, Charles S. Jones, W. E. Morgan, Sam Grinsfelder, and E. G. Starr.

In par. 11 it was asserted that qualified witnesses would be needed to testify to California custom and usage of terms, but none were named.

The documents which affiant said he had examined or supervised the examination of, and which were said were needed, were not specifically described or identified except generally as being (1) the files of defendant and its subsidiary relating to the acquisition and subsequent leasing of the land, and (2) records of Universal Consolidated Oil Company re status of net profits interest, and (3) those of the escrow bank to show deposits to the credit of the 8-1 3[illegible] (not in suit).

In par. 12 it was claimed that a court trying the case "would need to view the California lands involved."

In the concluding portions of the opening paragraphs of such affidavit, affiant said that his interviews with the named witnesses and examination of the records mentioned formed the basis of the claim that "the convenience of parties and the witnesses and the interest of justice" would be served by transfer to the California Southern District.

2. Respondents' evidence at the hearing on motion to transfer.

The record shows that after such affidavit was filed and before the hearing on the motion, respondent Gregson and his attorneys interviewed witnesses on such list and secured information from them *directly contradicting* matters contained in such affidavit; and that such attorneys in advance of the hearing on such motion requested that the author of such affidavit be present for cross examination when the motion was heard, and told such attorney for petitioner that direct contradiction was intended; and that if he could not come, to send someone of those who had acted under his supervision in conducting whatever investigation had been made so that the affidavit would have a sponsor who could be cross examined as to the truth and correctness of its contents (Vol. 2, p. 223, R.M.T.). Despite this, when the motion was heard, neither the author of the affidavit nor any other witness was present to sponsor it.

Respondents thereupon proved:

(1) The only persons alive who had taken part in the discussions and negotiations leading up to and culminating in the 1943 contracts were F. L. Metzler, who represented promisors, and George Gregson, who

represented promisees in such transactions, and that these two were the only "key" witnesses. F. L. Metzler's oral deposition had already been fully taken and transcribed at the time of the hearing on the motion to transfer. That he had been assigned by petitioner to give his full time to the matter after the suit was filed and was still an employee of petitioner, and had stated in his deposition that he would attend a trial in Texas, if requested by petitioner. That respondents both in writing and at the hearing on such motion offered to pay all his expenses of attending the Texas trial and were ready, able and willing to do so. (Metzler later attended in person both pre-trial and trial on the merits and testified.)

Gregson testified that he had been actively engaged in drilling "a lot of wells in Texas" together with respondent Paul C. Teas since about 1948 or 1949 and was in Texas and at Dallas frequently on that account, and it would be convenient to him to attend a trial at Dallas; and that his father in law, Dr. Edwin Janss, and the latter's brother, Harold Janss, both respondents who had had some minor contracts in the course of making the contracts, would and could with convenience attend the Texas trial. (All three later personally attended the Texas trial on the merits.)

(2) Respondents proved by the affidavits of Edna Hollister and Marie Chester (P. Exs. 1 and 2, introduced Vol. 2, p. 39, R.M.T.*) and by the testimony of

*Note: As to location of exhibits introduced at the hearing on the motion to transfer: photostats of the tables are in the back of Vol. 2; the affidavits were filed prior to the hearing, and are contained in the group of filed instruments certified up to this Court in original form on Motion of Respondents, and are there arranged by date of filing, as indexed by the clerk's docket (R. 2-8).

the witness Cantey (Vol. 2, pp. 27-36 and pp. 36-40, R.M.T.) that, contrary to petitioner's affidavit, neither of them had been present during any negotiations or discussions while the contracts were being drawn; Marie Chester did not go to work for Alfred Wright, who was respondents' resident counsel, until June 1943 *after* the final contracts were executed and delivered in April. Edna Hollister had typed one letter and one of the yellow drafts of the contracts, but except for being able to identify her typing of such instruments she knew nothing whatever, and during the ten years she worked for Wright she was never present during any discussion with a client. She had never met either Metzler or Gregson. Each had been telephoned by some unnamed person from Loeb & Loeb. Hollister was asked concerning the dates and duration of her employment by Alfred Wright, but nothing else. Chester was asked when she went to work for Alfred Wright and where Hollister could be located, and nothing else. Hollister said that if desired she would be "happy" to attend and testify in any court, including Texas.

(3) Respondents offered the affidavit of Joseph Jensen (P. Ex. 7, Vol. 2, p. 92, R.M.T.), named as a "necessary" witness to prove matters in par. 7 of petitioner's affidavit, in which he says that, after reading par. 7: "In fact, affiant has no knowledge of such matters and could not testify to the truth of such matters," going on to state what contacts he had had with Gregson by telephone in 1954, and that he was wholly unacquainted with the terms of any contracts made in 1943 and had never discussed them with Gregson. (Joseph Jensen attended in person the Texas trial on the merits, being called to the stand by respondents to prove some other matters.)

John E. Clay and C. J. Williams, who were not interviewed after the filing of petitioner's affidavit, had been previously visited by respondents' attorney, at which time it was ascertained that their only contact with the matter was in 1951-2 and the extent of their knowledge with respect to any transactions was that they had made an offer and took a lease in behalf of Universal and thought it was good property; and that the terms of the lease had been drafted by Mr. Clay after contacts with petitioner's representatives, and he was responsible for some of the terms employed in such lease (Vol. 2, pp. 211-14, R.M.T.) (Oral depositions of both Williams and Clay were later taken, and such depositions were offered at the trial (R. 1409-1450, 1459, 1471, 1593, 1623.)

(4) In contradiction of the statments in par. 8 of petitioner's affidavit, which listed 13 additional witnesses, previously named, respondents secured and offered affidavits of seven of those listed, to wit: Frank Long (P. Ex. 8, Vol. 2, p. 120, R.M.T.); L. W. Frankley (P. Ex. 9, Vol. 2, p. 124, R.M.T.); Charles S. Jones (P. Ex. 10, Vol. 2, p. 137, R.M.T.); Sam Grinsfelder (P. Ex. 11, Vol. 2, p. 142, R.M.T.); Paul H. Milliken (P. Ex. 13, Vol. 2, p. 216, R.M.T.); and a joint affidavit of Harold C. Morton and Chester Dolley (P. Ex. 14, Vol. 2, p. 218, R.M.T.); and a letter from Frank A. Morgan dated 7-30-58 (P. Ex. 15, Vol. 2, p. 222, R.M.T.).

In each of such affidavits affiants denied personal knowledge and stated that they could not testify to the matters in par. 8. Long stated that no one representing defendant or any of its attorneys "has ever asked affiant concerning his knowledge or lack of it as to any of the matters which such affidavit says

they propose to prove by him as a necessary witness for such defendant." Frankley stated in his affidavit that his only contact had been on June 13, acting in behalf of Indian Oil Company to make an offer in a letter to lease the property, which was rejected. Jones stated that his only contact had been to unsuccessfully negotiate for a lease in behalf of Richfield (in 1951) prior to the lease to Universal. Grinsfelder stated that he "understands that an indetermined number of offers were made" for a lease in the year 1951, and that he in behalf of Union Oil in that year made a proposal for a lease rejected by Metzler's letter of September 25, 1951, and later sent a telegraphic bid on October 2, 1951, which was not accepted, and that such constituted the extent of his knowledge. In Milliken's affidavit he stated: "I have no direct knowledge of the matters alleged in said paragraph 8, except that I know that an indetermined number of inquiries and offers were made." Morton and Dolley stated that their only previous contact had been in the fall of 1951 to submit a bid for Atlantic, which was sent to Chase National Bank in New York, as directed, and affiants were informed later that Universal's offer had been accepted and a lease given to that company, and that thereafter they had become one of counsel for respondents, and contrary to petitioner's affidavit, no representative of petitioner had ever interviewed them on any matters contained in petitioner's affidavit and they "have given defendant no reason to suppose that the matters set forth in paragraph 8 are true."

Testimony concerning petitioner's contacts with Frank Morgan (Vol. 2, pp. 219-22, R.M.T.) showed he had been contacted by the author of petitioner's affidav-

it and was reluctant to make an affidavit against him and stated "that he didn't want to give a deposition to say he didn't have personal knowledge on the matters contained in that affidavit where he was named as having it," but that "I don't have such information and personal knowledge," and in his letter expressed a willingness to come to Texas to testify if needed. The address given in petitioner's affidavit was one he had moved away from (Vol. 2, p. 131, R.M.T.).

Respondents offered testimony by Gregson showing that McDuffie lived no longer at the address given by petitioner and had moved to Santa Barbara and could only be reached by telephone (Vol. 2, pp. 107-112, R.M.T.) and had been very ill for some time and on being read petitioner's affidavit denied knowledge of any of the matters contained in par. 8 (*Id.*, p. 110) and said that no one representing petitioner had called him or contacted him (*Id.*, p. 111) and stated he was retired and "that he had three doctors that wouldn't let him testify anywhere, wouldn't let him write a letter, wouldn't let him give answers to written interrogatories" (*Id.*, p. 276).

Concerning George Thompson, Gregson testified that he finally contacted him and Thompson stated that the only thing he knew was that he had been president of Hillcrest Country Club, which adjoined the studio on the south, and that at one time there had been some conversation about drilling the country club property from a site on the studio, and that he knew nothing about the 1952 lease and did not know the 1943 contracts existed or concerning any other matters mentioned in petitioner's affidavit (Vol. 2, pp. 114-16, R.M.T.).

Respondents proved by Gregson that Harold W. Hoots no longer lived at the Los Angeles address given in petitioner's affidavit, and that he had moved to Grant's Pass, Oregon, with no plans to return to Los Angeles, and stated, on being called in Oregon, that "he had no idea about any of the items that I read to him, which were all in paragraph 8," and that he had been an engineer for G & M Oil Co. at the time a joint bid with Atlantic was worked out. He had *never* talked to anybody representing petitioner about any of such matters (Vol. 2, pp. 129-131, R.M.T.).

Respondents proved by Gregson that W. E. Morgan, whose address was given in Petitioner's affidavit as "Union Oil Center" in Los Angeles, had moved from Los Angeles to Denver, Colorado, in the fall of 1951, and had severed his connections with Union in 1955 and for the preceding seven years resided and had his office in Denver, Colorado (Vol. 2, pp. 137-9, R.M.T.)

(By time of trial on the merits petitioner had taken depositions of none of the persons listed in its supporting affidavit except Clay and Williams, and called none of them in person. The record shows that it took the deposition of its former officer H. G. Place in New York and a stipulation was made concerning testimony of Sherman Adams of Boston, Massachusetts. Henderson, petitioner's treasurer from New York, was present at the trial on the merits but was not called to testify.)

(5) Respondents proved they had nine Texas witnesses whom they had contacted previously and who were highly qualified and available to testify concerning California oil and gas industry custom and usage

as to the meaning of pertinent terms, most of them residing in Dallas and Fort Worth in the Northern District of Texas, but who had had extensive experience in the oil and gas industry and in leasing practices in the Los Angeles Basin in the year 1943 and subsequently, as well as in other oil-producing states. A list giving the names of such witnesses was referred to and given to petitioner. (At the trial on the merits one of the two such witnesses called by respondents resided in Dallas, but had been an officer of Seaboard with extensive leasing experience in the pertinent area at the time of the contracts. At the petitioner's insistence and over objection of respondents, the trial court limited each side to two expert witnesses each. One of petitioner's industry usage witnesses, Carl T. Long, had an office and place of business in Dallas, Texas, as well as in California (R. 1480), and its other witness, Carver, was sent to testify by his employer, General Petroleum Corporation (R. 981).)

(6) Concerning any necessity for resort to files, records and documents of petitioner, respondents proved that when the Metzler and Gregson oral depositions were taken prior to the hearing on the motion to transfer there had been an exchange of documents, and each side had been permitted to make copies of all pertinent documents. Petitioner's production of documents had been in response to subpoena duces tecum (Vol. 2, pp. 147-8, R.M.T.). Many of such copies produced had come from petitioner's records in New York (Vol. 2, p. 146, R.M.T.). Respondents agreed in open court to demand the production of no original documents at trial and for the use of photostatic copies and offered to pay for copying same (Vol. 2, p. 225, R.M.T.).

With respect to any need for current statements from lessee, Universal Consolidated Oil Company, on the status of the net profits interest, respondents proved that Universal was furnishing such statements monthly and offered in evidence a statement of 6-30-58 (P. Ex. 12, Vol. 2, p. 146, R.M.T.) and proved that only a dollar figure was needed at trial and that such statements consisted of one page plus four supporting pages (Vol. 2, pp. 145, 226, R.M.T.). Respondents in open court agreed to accept such statements, thereby eliminating any need for original records.

With respect to any records at the escrow bank, respondents showed that all such records and credits related only to the 8-1/3% (not in suit) (Vol. 2, p. 86, R.M.T.).

(7) At the conclusion of such hearing the trial court observed from the bench:

> "That leaves, stating it most liberally, the affidavit of Mr. Walker very badly crippled, and we do not consider it sufficient, in the light of the test of cases, to justify removal, in the light of all the other circumstances of the case."

and thereafter in its order denying such motion that court expressly found for respondents on the facts (R. 90).

(8) Respondents also offered extensive testimony to negate any inference of "forum shopping," as now charged in the petition.

As previously stated, respondents proved that Gregson and the Janss family had been, in association with respondent Teas, actively engage in the oil business in Texas since 1948 or 1949 and had drilled a lot of

wells together (Vol. 2, p. 158, R.M.T.). That during the first half of 1957 Gregson had discussed with his long time friend and business associate, Paul C. Teas, who was a geologist and in the oil business both in California and Texas, the 1943 contracts and the later lease to Universal and had secured Teas' advice and opinion as to the rights of the promisees to be paid an amount equal to half of the net profits interest as constituting a bonus. That long prior to any determination being made to file a suit in Texas and before it was learned that petitioner had a place of business in Texas and a permit and agent in such state, Teas recommended the Fort Worth attorneys because they had previously successfully represented him and some California clients in earlier important oil and gas litigation (Teas dep., p. 18) and made the contact and brought Gregson to see them (Vol. 2, p. 157, R.M.T.), and Gregson asked them to undertake the case on a contingent basis (Vol. 2, p. 168, R.M.T.). Gregson testified such Texas attorneys were engaged only because of their reputation and experience in oil and gas cases which he confirmed from sources other than Teas.

During the summer and fall of 1957, while such attorneys were working on the case, filing suit in Texas was not contemplated, and it was expected to be filed in either California or New York, and it was not until the latter part of 1957 or early 1958 that it was determined to file it in Texas (Vol. 2, p. 209, R.M.T.).

Such attorneys before finally determining where to file such suit made an extensive investigation for the purpose of determining the matter of where an ex-

peditious trial might be secured and concerning the relative condition of the dockets of the respective U. S. District Courts at Los Angeles and at Dallas. Such included consultations with a number of Los Angeles lawyers and firms who estimated a delay of 1-1 2 to 2 years and a visit by respondents' attorneys to the clerk's office for the Southern District at Los Angeles (Vol. 2, p. 227, R.M.T.). In addition, such attorneys examined all information contained in the September 1957 "Annual Report of the Director of the Administrative Office of the United States Courts" concerning time intervals between trial and disposition of civil cases as between the trial courts and as between the Courts of Appeals. (Later offered in evidence by respondents at the hearing on motion to transfer as P. Exs. 16-20, Vol. 2, pp. 229, 230, 231, 232, R.M.T.).

The uncertainties and delays to which the suit would have been exposed under the condition of the docket and trial calendars and rotation system in the Southern District of California was fully shown (Vol. 2, p. 228, R.M.T.).

That it was the opinion of respondents' attorneys, after making all such an investigation, that if the case should be filed in the Southern District of California, a delay from a year and a half to two years might be anticipated while the average time in the Northern District of Texas was six months (Vol. 2, p. 232, R.M.T.). It also appeared that appellate disposition by the 5th Circuit would be much more prompt than before the 9th Circuit (Vol. 2, pp. 237-8, R.M.T.).

(9) Such was the character of the evidence adduced before the trial court, which affirmatively showed re-

spondents' reasons for not filing the suit in either New York or California.

(10) While, as correctly stated in the petition, it appears in his deposition that Teas received no written assignment until about the time the suit was filed, it further appears in such deposition that in October or November 1957, when on a trip to Los Angeles, Teas talked to Gregson about putting some money into the case (*Id.*, p. 14), and in February 1958 was back out there and they discussed the terms and price, and it became a deal (*Id.*, p. 15). In explaining why it was determined to sell a small fraction to Teas, Gregson testified at the hearing on motion to transfer that he wanted the benefit of Teas' experience and his assistance in contacting other qualified witnesses on custom and usage in the oil industry, and that by that time Gregson had already been advancing some of the expenses personally because there were 13 or 14 people interested, and "I felt that if we had some funds on hand to go forward toward defraying some of the costs, it would place less of a burden on me" (Vol. 2, pp. 167-8, R.M.T.).

Gregson testified positively that he did not recommend the sale and assignment of such interest to Teas in order to file the suit in Texas (Vol. 2, pp. 168-9, R.M.T.). (At the trial on the merits Teas attended the trial, but was not called by respondent as a witness on industry usage when the trial court decided to limit the number of witnesses which each side would be permitted to call and later reduced the number from 3 to 2 at the request of petitioner and over objection of respondents (R. 1560-65).)

3. State of the record when it came before the Court of Appeals:

That petitioner did not designate such record for printing or attempt to support its specification of error based on a denial of such motion among the points which it argued in Appellant's Brief filed there has been stated.

By that time the case had been fully tried on the merits and a printed record was before the Court of Appeals affirmatively showing:

(1) That the only two "key" witnesses, Gregson and Metzler, had attended and testified in person.

(2) That the only officers representing petitioner and attending such trial came from New York.

(3) That petitioner's regular attorney in Texas who resided at Dallas and who had presented the motion to transfer took an important part at the trial on the merits, which was also attended by petitioner's regular New York attorneys, as well as attorneys from California.

(4) That the only limitation which was placed on the number of witnesses was as to the number of experts on industry usage of terms, and that such limitation was imposed by the court at petitioner's request over respondents' objection.

(5) That petitioner had taken no depositions of any of the persons named in his previous affidavit except the oral depositions of Clay and Williams of Universal, which depositions were admitted.

(6) That petitioner had been accorded a full and fair trial, including pre-trials as well as the trial on

the merits, and had been permitted to fully develop all of its defenses.

(7) That, shortly prior to Dec. 8, 1958 (date of original trial setting on merits), petitioner on a Nov. 29, 1958 hearing sought and secured a Pre-Trial hearing for Dec. 8, 1958 and a postponement of trial to afford its counsel more time. (This explains why almost a year elapsed between filing and trial, which lapse petitioner pretends (p. 22, footnote) shows no more expeditious trial was available in N.D. of Texas than in S.D. of Calif.)

(8) That it was not asserted that petitioner had suffered any prejudice or been denied an opportunity to offer any documentary evidence desired, and that copies had been used and accepted at such trial with no demand for originals.

(9) That many of such copies came from the files and records of petitioner's place of business in New York, and that each side had been allowed to fully present copies from records in Los Angeles.

(10) That the California law of contracts is substantially the same as Texas law of contracts as well as elsewhere.

(11) That the testimony which petitioner hoped to secure from the persons listed in petitioner's affidavit presented at the hearing below dealt with immaterial and irrelevant matters.

SUMMARY OF ARGUMENT

I. Argument on jurisdiction:

Diversity and requisite amount in suit being undisputed, we examine the question of whether the District Court in Texas had jurisdiction of the subject matter.

Such is determined by the "gravamen of the action" and its "essential features" from the allegations in the complaint and relief sought. The Federal Courts and the courts of Texas and California have many times held a claim seeking to enforce a promise to pay money is by its nature "transitory" and not "local."

The complaint under scrutiny declares that petitioner promised respondents to pay money, and that such promise should be established and enforced against petitioner with an accounting. Whether considered for jurisdictional or venue purposes, such a claim is against the person and results only in a judgment *in personam*, such as entered in the instant case. Such an action is sustainable wherever the defendant may be found, as stated long ago in *Livingston*.

While a decree rendered in one state cannot *ex proprio vigore* directly affect title to lands in another, jurisdiction is not lacking to enter and enforce a decree in equity acting upon the person of a defendant who is before the court. References to land in a contract may be, as here, only "incidental."

In answering the question, "What is this case?" it is also essential to consider what is *not* claimed in such suit and what rights were *not* conferred on respondents under such contracts.

Petitioner's promise was a "joint and several" one,

and respondents could, under the law of California and elsewhere, sue Twentieth Century alone, and Fox Realty was not an indispensable party. But it is petitioner's argument that its promise could be nowhere enforced against it unless Fox Realty was also sued.

The defendant below was *not the owner of the land*, nor did it own any interest in the minerals at the time the contract was made or at any time thereafter, and it is unnecessary to consider what sort of complaint might have been filed, but which was not, against Fox Realty as the other "joint and several" obligor.

By such contracts it was the promise that petitioner would pay to promisees on the 20th day of the second calendar month *after* the month during which another corporation was paid by any lessee a sum of money equal to and measured by a specified fraction of those receipts. It was no more than a yardstick.

In return promisees parted with all their former rights, titles and interests in the land and in any minerals which might be thereafter produced therefrom. A complete surrender of title was affected by contemporaneous releases and assignments, and a later deed given not to petitioner but to Fox Realty and all legal and equitable title passed to the latter.

The instant suit asserts no claim to the lease "proceeds" as such, and the defendant below owned none of them. It was not agreed in our contracts that promisees should own a share in any of the leasing proceeds as such, nor was a fund created out of which such payments were to be made. Language appropriate to create such a right is not to be found in such

writings. Other clauses as we shall see forbid the idea.

Respondents might have asserted in the complaint (without warrant) that they owned a "royalty" or that a lien should be fixed and enforced against a part of the oil and gas production, but such was not alleged, and no such relief was sought or granted. But such is the premise of petitioner.

All rights of Fox Realty as lessor to have Universal as lessee fully perform its obligations under such lease and to retain the benefits therefrom remain unimpaired by this suit and judgment. Any lament on the part of the subsidiary that the parent company may be forced to keep its 1943 promise to pay respondents a sum equal to and measured by a part of lessor's future receipts is but an indirect consequence and irrelevant.

To ascribe an "impact" upon the "real property rights of Fox Realty" is to disregard the separate corporate entities, but the assertion that Fox Realty is an "indispensable party" whose joinder would destroy diversity depends on recognition of the separate entities.

Petitioner's statement that respondents have been "awarded" by the courts below one-half of the so-called "variable participating royalty" is contradicted by the relief granted and affirmed.

Petitioner proceeds upon a false predicate. Its primary assertion that respondents claim "an interest in proceeds from California oil and gas production," and that the courts below have "decided" in "conflict with applicable California decisions" that such is not a

claim for "an interest in real property" is unfounded. The courts below did not so "decide," and no such question was before them.

The seven California cases cited by petitioner to support its assertion that "the very contract upon which the claim is asserted is itself regarded by the law of California as creating in respondents an interest in real property" are inapplicable. No such holding is to be found in such cases.

In none of them was plaintiff seeking to recover against a stranger to the title. In none was plaintiff's claim limited to a simple demand for the enforcement of a contract to pay money based upon mere privity of contract as distinguished from privity of estate. In none was A seeking to enforce B's promise to pay money in an amount equal to and measured by C's future receipts. None involved any question of jurisdiction or whether the action was local or transitory or any asserted defect of parties.

Five, *Callahan*, *Van Acker*, *Schiffman*, *Chase* and *La Laguna*, were suits to establish rights either granted or reserved in actual conveyances or assignments against other parties in privity of estate.

In the *County of L. A.* tax case the court found that the contract examined was by its terms in effect an ordinary oil and gas lease which conferred possessory rights requisite to the application of a particular taxing statute. In the only other case cited, *Taylor*, the interest asserted was in the proceeds as such, and privity of estate was claimed.

In none of them was the court construing contracts like ours and in none was it decided that such a con-

tract conferred an interest in land. Other distinguishing features render them inapplicable.

The California courts have acted with discrimination and have made limited holdings on the precise issues joined.

There are, however, unmistakable holdings in California and elsewhere that a contract containing promissory language such as found in the 1943 contracts, viz., a promise to pay "an amount equivalent to" receipts, proceeds or profits creates only a general obligation to pay money to the promisee as a *creditor*. It has further been held that such a promise does *not* create any interest in land or in proceeds or profits as such.

In the instant case the findings below that it was the *intention* of the parties to create only a personal obligation to pay money and to confer no interest in the land or against the mineral proceeds as such was upon a question of *fact* and has foreclosed the inquiry.

When the lease was being taken by Universal, both the experienced California lawyers agreed that such 1943 interests conferred on promisees only "a contract interest" and that "they were not royalty interests." One of them, representing petitioner and its subsidiaries and who was a Fox Realty officer, had helped draw the 1943 contracts and the other represented Universal as lessee.

That it was the *intention* of the parties to these contracts that promisors made only a personal promise to pay money was *rendered unmistakable by express clauses* in such contracts providing that such personal covenants would expire when and if the landowner

should thereafter execute and deliver a deed in a prescribed form under which the grantee would have been thereupon and thereafter invested with an interest in the minerals and proceeds, but this was never done.

It must be concluded that the Court of Appeals, in affirming the judgment of the District Court and in holding that the suit was one to establish a claim seeking to declare and enforce a promise to pay money and was not for an interest in California lands, did not decide a question of California law contrary to and in conflict with any applicable Califolnia court decisions. The Texas court had jurisdiction.

II. Argument on motion to transfer:

Asking a writ in a petition which concludes with the assertion (p. 23) that "the failure of the District Court to transfer the action constituted an abuse of discretion so marked as to warrant the exercise by this Court of its power of supervision," petitioner occupies a position, assuredly a novel one in this Court, of having failed to even bring up that part of the appellate court record of the hearing on the motion to transfer in the District Court showing the factual predicate for action in both such courts. How else could such a charge of flagrant abuse of discretion be examined? Respondents might have contended themselves with leaving petitioner in such a predicament, but have preferred instead to secure a certification by the Court of Appeals under Rule 21, par. 6, and that original record is now before this Court.

Petitioner, in invoking the exercise by this Court of its supervisory jurisdiction, does not assert that

the judgments below on the merits were wrong or show that a different result would have been reached had the case been tried on its merit elsewhere. It has not attempted to show that the case was not fairly tried on the merits, or that petitioner was denied opportunity to develop all its defenses or otherwise prejudiced.

This Court does not deal in abstractions.

This Court is not one for correction of errors in fact-finding and will not review concurrent findings by two courts below absent "a very obvious and exceptional showing of error." The only evidence in support of transfer which movant below offered was strongly contradicted and substantially impeached. The trial court resolved all factual disputes against movant.

"Unless the right to choose between conflicting facts or assertions exist, the (trial) court could never determine a motion under this section (1404(a)) *on the facts.*"

As said by this Court in *Norwood*, the relevant factors have not changed, and plaintiff's choice of forum is still to be considered. As recognized in that case, *Gulf Oil v. Gilbert* has been qualified only to the extent of investing a broader discretion in the trial court so as to permit its grant of transfers upon some lesser showing of inconvenience, but *Norwood* only reconfirms that upon being confronted with such a motion it must exercise "discretion" according to the facts before it in each particular case. When disputed, it remains the function and unavoidable duty of such trier of the facts to resolve such a dispute.

In accordance with "the accepted and usual course

of judicial proceedings" disputed facts on this motion were resolved after a lengthy hearing in the court of first instance, and the Court of Appeals with that record before it declared it found no indication that the trial court had abused its discretion. Every factor held relevant under 1404(a) was weighed.

Normally the parties are entitled to an adjudication of their rights in the tribunals which Congress has empowered to act, and Congress having opened the Federal Court to suitors in diversity cases involving the requisite jurisdictional amount, a plaintiff is not to be lightly deprived of his choice of forum.

While normal appropriate venue may sometimes operate "vexatiously," such must be proved as any other ultimate fact, and the resolution of such a dispute is peculiarly within the province of the court who heard the witnesses, observed their demeanor, and could consider their credibility. That a trial of the case in Texas would *not* operate vexatiously on petitioner or impose needless hardship has been determined against petitioner.

Petitioner's earlier intimation and recent charge that respondents engaged in "forum shopping" was disproved and also determined by a finding for respondents on all facts. Such evidence showed among other things that an expeditious trial and disposition of the case might be obtained in the Texas court and on appeal to the 5th Circuit, and that a contrary condition existed in the California Southern District and 9th Circuit, and that such had an important bearing on respondents' choice of forum.

The Texas cases and opinions of the 5th Circuit

are replete with references to California decisions, and vice versa, and it has been shown and cannot be seriously contended that the law of California on contracts is either unique or substantially different from contract law in Texas or elsewhere. Relevant factors in the place of trial on a personal injury case have obvious distinctions from an action based on a breach of written contract where tried by a court without a jury.

The petition for writ of certiorari should be denied.

* * * * * *

ARGUMENT

The Claims Asserted and the Relief Sought By Respondents in This Suit against Petitioner and the Relief Granted Were Subject To the Jurisdiction of the United States District Court in Texas

There being no dispute in this case concerning diversity of citizenship or the amount in suit, the question here is whether or not the District Court in Texas had jurisdiction of the subject matter. Whether such court had jurisdiction of the subject matter is controlled by the "gravamen of the action" and its "essential features," which are to be determined from the allegations in the complaint and the relief sought. *Stone v. U. S.*, 167 U. S. 178 (1896).

While no close question is presented here under allegations of a complaint seeking only to establish and enforce against defendant its promise to pay money, in order to answer petitioner's argument on local and transitory actions and its cited cases we will first distinguish such cases and show that the federal courts and those of Texas and California have many times held actions "transitory" in even close cases in which claims not directly affecting the land have been regarded as "incidental."

On examining the complaint in *Stone* this Court found that the "gravamen of the action" was the conversion of the lumber and ties made from the trees taken from the Government land, but that a personal judgment for the property so converted was sought,

and that no judgment was asked on account of the trespass, and that its transitory nature persisted despite the introduction of an issue at trial as to the ownership of the land. This Court in that case distinguished *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105 (1894), relied on by petitioner in the instant case, because, as shown by the allegations of the petition in Marietta, "the trespass upon the land was the principal thing, and the conversion of the property was incidental only."

We have no such action ex delicto[15-a] as was before the court in *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C.D. Va. 1811) relied on by petitioner, in which Chief Justice Marshall examined a case in trespass q.c.f. and reluctantly held it local in nature after recognizing that the rational distinction between local and transitory actions is the distinction between an action *in rem* and one *in personam*.

Guarantee Trust v. Delta & Pine Land Co., 104 F. 5, and *Boyce's Executors v. Grundy*, 9 Pet. 275, also cited by petitioner, are inapplicable in the instant

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[15-a] As confessed in the petition (p. 10), "as against petitioner the suit sounds in contract." Ours being an action on contract, *Livingston* is inapposite under distinctions there drawn. See Note, "Jurisdiction of action at law for damages for breach of contract, or for tort concerning real property in another state or country," 26 L.R.A. (N.S.) 928, 933-4, pointing out that Marshall, C. J., observed in *Livingston* that under English common law (by which he felt the jurisdiction of the U. S. trial courts should be determined because the Congressional grant of jurisdiction was that of courts "at common law") the forum "took jurisdiction of . . . all contracts, wherever executed even contracts respecting lands that were in fact situated beyond the realm," and had in making such distinction said: "It is admitted that on a contract respecting lands, an action is sustainable wherever the defendant may be found."

case.[15-b]

Where, as here, the complaint only declares that the defendant has given his promise in a contract to pay money, which should be established and enforced against him so that an accounting may be had as such sums become due, and in which no other relief is sought, the "gravamen of the action," whether considered for jurisdictional or venue purposes, is personal and transitory in nature and results in only a judgment *in personam* as held by that same great Chief Justice in *Massie v. Watts*, 6 Cranch 148 (1810) and that such an action may be maintained wherever jurisdiction over the person of the defendant can be had.

Since time out of mind, such has been the rule in both the United States courts, 1 *Moore's Fed. Prac.*, Sec. 0.142(2.-1), and in the several states, including California and Texas. *Platner v. Vincent*, 187 Cal. 443, 202 P. 655 (1921); *Hall v. Jones*, 54 S. W. 2d 835 (Tex. Civ. App., 1932, *err. ref.)*[16].

[15-b]In *Delta & Pine* the 5th Circuit correctly held that a federal court in Tennessee lacked jurisdiction to order a judicial sale of Mississippi land, although recognizing the jurisdiction of such a court under *Massie v. Watts* to enter an *in personam* decree. Plaintiff's title in the later Mississippi suit to remove cloud depended on a deed executed pursuant to the Tennessee decree to which the Mississippi defendants were not parties.

The distinguishing features in *Grundy* were afterwards clearly pointed out by Judge Sanborn in *Byrne v. Jones*, 159 F. 321, 328 (8th Cir. 1908): In a Tennessee suit the court, after ordering a contract concerning Mississippi lands rescinded, rendered a personal money judgment against Boyce, who owned the Mississippi lands and then attempted to fix a *lien* upon such lands and ordered them sold, which this Court understandably held an act beyond the jurisdiction of the Tennessee Court.

[16]That the rule is the same in both Texas, the forum state, and in California, where the contract was made, appears in an important recent case by the Texas Supreme Court, *McElreath v. McElreath*, 4 Tex. Sup. Ct. Journal 440, of April 22, 1961, opinion delivered on motion

After expressly confirming the rule that resort must be had to the averments of the complaint and the character of judgment which may be rendered to determine the transitory or local nature of an action, a California District Court of Appeals in *Work v. Assoc. Almond Growers*, 245 P. 790, 791 (1926), said:

> "It is manifest from a reading of the complaint that the only relief sought is a money judgment. An action which has for its object the mere recovery of money is essentially an action for debt, and therefore transitory and not local."

In *Platner*, supra, the Supreme Court of California held that an action of covenant founded on privity of contract is transitory even though the covenant sought to be enforced against one of the "joint and several obligors" also ran with the land in the state of Washington, pointing out that any investigation into the title of the land described in the deed was only "an incident to the main inquiry or complaint," and that it was not a suit for land, and went on to quote from and expressly agree with a leading case by the Illinois court, *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73 (1894), stating the rule:

> "Where the relief sought does not require the court to deal directly with the estate itself, the proceeding does not affect real estate * * * The

for rehearing April 19, 1961, in which the court, in considering whether or not the Texas court would enforce an Oklahoma judgment directing defendant to execute a deed to Texas land, looked to and expressly approved the California rule as stated in *Simmons v. Superior Court*, 96 Cal. App. 2d 119, 214 P. 2d 844 (1950), in which that court had ordered a stay of California proceedings pending final determination of an existing suit in Texas, which in part involved the rights to California land and in which the California court had observed: "The courts of Texas are as competent to administer justice as those of California."

> court, having the parties in interest all before it, may proceed, although the land to which the controversy relates may lie without the jurisdiction of the court."

As held by the California Supreme Court in a leading case, *Neet v. Holmes*, 19 Cal. 2d 605, 122 P. 2d 557, 560 (1942)[17]:

> "The principal relief sought by the plaintiffs is an accounting of operations in the leased property and in the additional twenty mines located by the defendants, and a judgment based on the fruits thereof, including title to the additional mines, of which the plaintiffs have been deprived by the alleged fraud of the defendants. Such an action is a proceeding in equity and is essentially a personal action."

In contrast, as later pointed out in that opinion:

> "The nature of the action is local, and must be tried in the county where the land is situated where it turns on the title to property as distinct from the personal obligation, and the decree operates *ex proprio vigore* on the title." *(Ibid.)*

In California, as in Texas, it is held that while a judgment or decree rendered in one state cannot of itself *ex proprio vigore* directly affect title to lands in

[17]In 1957 cited and quoted at length as being "the most recent expression of the California Supreme Court upon this subject" in *Miller & Lux, Inc. v. Nickel*, 149 F. Supp. 463, 465, by the U. S. District Court California S.D. after an extensive review of the authorities beginning with the distinction between local and transitory actions as declared in *Massie v. Watts*, "where the defendant in the original action is liable to the plaintiff . . . in consequence of contract . . . the principles of equity give a court jurisdiction, wherever the person may be found," and concluding that the classifications in the California courts are compatible with the Federal authorities.

another, this does not mean that jurisdiction is lacking to enter a decree in equity acting upon the person of the defendant who is before the court which declares the rights between them or to compel specific performance of a contract to convey land situated in another state. *Redwood Inv. Co. v. Exley*, 221 P. 973 (Cal. Dist. Ct. of Appeal, 1923), cited and quoted from with approval by the California Supreme Court in 1957 in *Rozan v. Rozan*, 49 Cal. 2d 322, 317 P. 2d 11, 16 (1957).[15]

In the case last mentioned the California court in declaring and following the rule "in the majority of the states" includes citations from Texas including *Hall v. Jones*, cited supra, in which the Texas court had earlier cited *Smith v. Davis*, 90 Cal. 25, 27 P. 26 (1891), where the California Supreme Court, following the principles of *Massie v. Watts*, held that the California court had jurisdiction to enforce a trust instrument "relating to certain lands in Washington Territory."

As said in a recent case by the 6th Circuit, *Gulf Oil Corp. v. American Louisiana Pipe Line Co.*, 282 F. 2d

[15] *Rozan* was a divorce action in which the court disposed of a contention that the judgment "directly affects the title to land in another state (oil lands in North Dakota) and therefore exceeds the court's jurisdiction," and that "a court of one state cannot directly affect or determine the title to land in another." The trial court had determined that the North Dakota properties "were acquired with community property and money" and had declared in making a property division that, as between the husband and wife, she was entitled to a specified share therein, and the Supreme Court of California affirmed such judgment "to the extent that it declares the rights of the parties before the court." After the husband acquired the North Dakota property and pendente lite, he divested himself of title by conveyances to his nephew (who was not made a party), and the Supreme Court properly modified the judgment below by striking that part of same wherein the trial court had attempted to enter a judgment declaring such conveyances to be a nullity and to *ex proprio vigore* vest title in the wife because directly affecting the title to such foreign land.

401 (1960):

> "The principal action was not *in rem*, but was to declare that the action of a party, in canceling a contract, was unlawful. The order of the court would operate against the party. This action, therefore, was transitory and not local in nature."

Having noticed in *Hall* and *McElreath* that the rule is the same in the Texas forum, we cite *Milner v. Schaefer*, 211 S. W. 2d 600 (Tex. Civ. App., 1948, *err. ref.*), approved 1961 in *McElreath*, in which a Texas court held a Colorado *in personam* judgment *res adjudicata* in Texas to fix and declare the rights between the parties to Texas real estate.

"What Is This Case?"

It is essential, in the course of affirmatively stating the nature and scope of respondents' claims in the instant suit against petitioner and in considering what right was conferred by the 1943 contracts, to also establish what is *not* claimed in such suit and what rights were *not* conferred on respondents under such contracts.

As shown by our previous "Statement" of allegations in the complaint, prayer, and decree, the nature of respondents' claim, viz., the "gravamen of the action" and its "essential features," was only to establish and enforce petitioner's promise in a contract to pay money and for an accounting. By the authorities previously reviewed such is the only proper way to

determine the nature of respondents' claims.[19] Our decree went no further.

It appearing in such complaint (as well as in the contract and by the findings and judgment below) that the promise which petitioner made was a "joint and several" one, in legal concept *three* contracts were created: one between the promisee and the first promisor, a second between the promisee and the second promisor, and a third between the promisee and both promisors. 2 *Williston on Contracts*, par. 320. Upon such a promise, it is unanimously held that a promisee may sue on either of the three contracts. Respondents elected to sue Twentieth Century to enforce its "several" promise alone, as it was authorized by law to do, and Fox Realty was not an indispensable party.[20]

[19]As recently held by this Court in *Pan American Pet. Corp. v. Superior Court of the State of Del.*, 29 U. S. L. Week 4477 (U.S., May 29, 1961), in determining whether or not a federal question was presented: "The answers depend on the particular claims a suitor makes in a state court – on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, the complaints in the Delaware Superior Court determined the nature of the suits before it."

Also, as determined by this Court in 1957 in *Smith v. Sperling*, 354 U. S. 91, in the course of determining federal diversity jurisdiction and whether or not there should be a realignment of the parties destructive of diversity, the proper course is "to determine the issue of antagonism on the face of the pleadings and by the nature of the controversy."

[20]*Camp v. Gress*, 250 U. S. 308 (1918). So expressly held in a suit for declaratory relief to enforce the rights under a contract made "jointly, severally and *in solido*". *T. & P. Ry. Co. v. City of New Orleans*, 159 F. 2d 77 (5th Cir., 1947). Repeatedly so held by the California courts:

In *Platner v. Vincent*, supra, 202 P. at p. 657, its Supreme Court found no defect of parties in a suit against only one of the joint and several obligors where it appeared from the complaint that the obligation sued on was "joint and several," and said: "From which it follows that defendant was severally liable and could be sued alone." When *Platner* was again before that court, 229 P. 24, 27 (1924): "The wife, being a joint and several obligor, could be sued alone. *Platner v. Vincent*, supra; *Holzheir v. Hayes*, 133 Cal. 456, 65 Pac. 968. The case last cited goes to the extent of holding that Sec. 1113, Civil Code, imposed a *personal* obligation on the grantor and is binding on one of

Since Fox Realty Corporation of California was not sued, it becomes unnecessary to consider either what sort of complaint might have been filed against it or any question concerning whether or not its joint and several promise could be construed to also operate against that corporation as an equitable assignment by it of an interest in the land.[21]

It was petitioner's personal promise that it would pay to the promisees in such contracts on the 20th day of the second calendar month after the month during which another corporation was paid by any lessee a sum of money equal to and measured by a specified fraction of those receipts. While it is true that petitioner's obligation to pay was to be in "an amount equivalent to" a specified percent of certain proceeds which another one of the "joint and several" corporate obligors was expected to receive in consideration for the leasing of the lands owned by the latter corporation, such promise on the part of petitioner was a far cry from and did not give to promisees any interest in such proceeds as such, nor did it designate a fund out of which such payments were to be made and did not confer upon promisees any interest in the oil or gas either before or after severance. It was no more than a yardstick.

In return for such "joint and several" personal cov-

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them, although he may have *no interest in the land* at the time of the execution of the grant." (Emphasis added).

As put by a California District Court of Appeal in *Williams v. Reed*, 248 P. 2d 147, 153 (1952): "When the obligation is *joint and several*, it is not nonjoinder to sue one alone" (citing cases).

The rule is the same in Texas. 32 *Tex. Jur.*, "Parties," par. 24, p. 43.

[21]Both contracts when read as a whole evince a lack of any such intention and contain express clauses for the giving of a deed in a prescribed form, which preclude any implication arising that such was the intention. (See ante, p. 14).

enants, promisees, as already shown, parted with all of their former rights, titles and interests in the land and in any minerals which might be thereafter produced therefrom. Such surrender was effected by releases, assignments and a deed, given *not* to petitioner but to the subsidiary corporation, and absolute title, both legal and equitable, passed to Fox Realty.

When it is recalled that petitioner in 1927 had parted with the title to the only tract which it ever owned, and because it owned no interest in any of the lands or minerals at any time thereafter, it is plain to see that it could have conferred on respondents no interest in or claim to either minerals or any proceeds from any later leasing of the land. It is, for this reason alone, inconceivable that petitioner's promise could have operated as an equitable assignment of any such interest.

Although it is unnecessary to do so in the absence of any asserted claim against Fox Realty Corporation of California, we next notice that the promise of that corporation created no more than a personal obligation on its part to pay money in an amount which was to be measured by, viz., "an amount equivalent to," a part of its receipts from future leasing, which would only become due and payable on the 20th day of the second calendar month after receipt by it. But Fox Realty did *not* in such contracts agree that promisees should have and own a share in any of the leasing proceeds as such, nor was a fund created out of which such payments were to be made.

One can suppose a case in which a vendee has given his vendor a contemporaneous contract containing promissory language coupled with an assignment or

given under factual circumstances showing an intention that the instrument should operate as an assignment or create a lien, but even then, in a later suit between them, the cause of action could be so cast as to assert only a transitory action to enforce the vendee's promise to pay without more, and the fact that the forum had no jurisdiction of the *res* would not deprive it of jurisdiction to grant *in personam* relief.[22]

Respondents could have sued Fox Realty as the other "joint and several" obligor, but did *not*. In the suit which respondents did file they could have asserted (although without warrant under the contracts) a claim to the lease proceeds as such, although petitioner owned *none* of them. Respondents might have asserted in the complaint (without warrant) that they owned a "royalty" or that a lien should be placed upon and enforced against a part of the oil and gas production, but such was not alleged, and no such relief was sought or granted.

[22]See notes: "Jurisdiction of equity over suits affecting real property in another state or country," 69 L.R.A. 673, 691; "Right of Vendor in Executory Contract for Sale of Realty to Maintain Action for Specific Performance where Land is Situated in Another State or Country," Ann. Cas. 1912-C, p. 539; "Jurisdiction of action at law for damages for breach of contract, or for tort concerning real property in another state or country," 26 L.R.A. (N.S.) 928, supplemented 44 L.R.A. (N.S.) 267.

In *Peninsula Trading & F. Co. v. Pac. Steam Whaling Co.*, 123 Cal. 689, 56 P. 604 (1899), where there was a claim *inter alia* for an accounting under a contract prescribing how proceeds from an Alaska salmon cannery were to be divided, the trial court's action sustaining demurrer for want of jurisdiction over the subject matter and of dismissal was reversed by the Supreme Court of California: "The facts alleged may be such as to entitle plaintiff to a larger measure of relief, if the action were pending in the courts of Alaska (where the land was), than can be awarded in . . . San Francisco, but the latter court is not for that reason deprived of jurisdiction to grant such relief as may be within its power."

Principles of Peninsula reaffirmed by Cal. Sup. Ct. in *Promis v. Duke*, 208 Cal. 420, 281 P. 613, 616 (1929), and in *Tully v. Bailey*, 46 Cal. App. 2d 195, 115 P. 2d 542, 545 (1941), approved in *Rozan, supra*.

In the petition it is stated (p. 11):

> "The pertinent inquiry is not to a characterization of the nature of petitioner's interest in the suit, but rather to the nature of respondents' interest and the necessary impact of the suit upon the real property rights of Fox Realty."

But, as held in the cases previously cited, in deciding jurisdiction *vel non* the nature of the claim in the complaint and its prayer for relief are determinative. The relief sought and granted against petitioner "does not require the court to deal directly with the estate itself," and did not therefore "affect real estate" under the test laid down by the California Supreme Court in *Platner v. Vincent*, supra. The decree asked for and granted did not "operate ex proprio vigore upon the lands in another jurisdiction to create, transfer or vest a title" and was therefore not a local action, as held by the same court in *Smith v. Davis*, supra and in *Neet v. Holmes*, supra.

Under such contracts, respondents had and asserted no cause of action against the lessee, Universal Consolidated Oil Company, and its rights and obligations as lessee remain wholly unaffected. All rights of Fox Realty as lessor to have such lessee fully perform its obligations under such lease and to retain the benefits therefrom remain unimpaired.

That the officers of such subsidiary corporation may lament the fact that the parent company will be forced to keep its promise made in 1943 to pay to respondents sums equal to and measured by a part of that lessor's receipts will be only an indirect and irrelevant consequence of an enforcement of the decree below. In an

effort to ascribe an "impact" upon "the real property rights of Fox Realty," it is the argument of petitioner, without saying so, that the separate corporate entities should be disregarded. But in the next breath petitioner insists that Fox Realty is an "indispensable" party whose joinder would destroy diversity, necessarily insisting that petitioner and Fox Realty are separate corporate entities.

In the petition (pp. 12, 9) it is said that respondents "acquired an interest in oil and gas" and have been "awarded" one-half of the so-called "variable participating royalty," but as has been shown neither statement is correct. On the contrary, by that part of the decree which the Court of Appeals affirmed, the judgment below determined, fixed and declared *only* the rights of respondents to be hereafter paid by the petitioner and the duty of such petitioner under such contracts to hereafter pay to such respondents, according to their respective interests, "sums and amounts equivalent to" 50% of any and all sums and amounts which may be hereafter received by Fox Realty as lessor under its lease to Universal "on account of or under those provisions of such lease which provide for the payment by such lessee to lessor of a 50% net profits interest and which is referred to therein as being a 'variable participating royalty'." (Decree quoted ante, pp. 8-9).

The claim here asserts against the petitioner only those rights arising under the 1943 contracts, and it is not necessary or material in the instant case to inquire or determine what the character of the rights or of the respective estates of an oil and gas lessor and lessee were under California law when the lease to

Universal was given nine years later. It is utterly immaterial to the present inquiry that the courts of California do not accept the theory of the ownership of oil and gas in place, or that they have characterized the interest of an oil and gas lessee as being "an interest or estate in real property in the nature of a profit a prendre, which is an incorporeal hereditament."

Of importance here is the fact that it was the 1943 promise of petitioner to respondents that any later actual receipts by its subsidiary corporation as lessor were to be the measure of its own obligation to pay two months later.

Petitioner's assertion (p. 10) "that the very contract upon which the claim is asserted is itself regarded by the law of California as creating in respondents an interest in real property" is not supported by the California cases which it cites.

Under a heading "Reasons for Granting the Writ" it is the primary assertion in such petition (p. 10) that respondents in this suit claimed an "interest in the proceeds from California oil and gas production," and that the courts below have decided "in conflict with applicable California decisions" that such a claim did not assert "an interest in real property." No such "claim" was made by respondents, as appears from the complaint. Neither of the courts below so "decided" and no such question was before them. We now leave behind this false premise in order to show that none of the seven cases cited by petitioner (pp. 11-13) support the further statement (p. 10):

"The transcendent fact is, however, as we will

> show, that the very contract upon which the claim is asserted is itself regarded by the law of California as creating in respondents an interest in real property."

In none of the California cases cited anywhere in such petition was the plaintiff seeking to recover against a stranger to the title.

In none of such suits was plaintiff's claim limited to a simple demand for the enforcement of a contract to pay money based upon mere privity of contract as distinguished from privity of estate.

No case has been presented in which A was seeking to enforce B's promise to pay money in an amount equal to and as measured by C's future receipts.

None of such California cases involved any question of jurisdiction or whether the action was local or transitory or any asserted defect of parties.

Five of them (all but the tax case, *County of Los Angeles v. Continental Corp.*, 113 Cal. App. 2d 207, 248 P. 2d 157 (1952), and *Taylor v. Taylor*, 167 Cal. App. 2d 120, 334 P. 2d 201 (1959), were suits to establish rights either granted or reserved in actual conveyances or assignments against other parties in privity of estate. *In each case (except the tax case) the claimant was asserting that he had an interest in land.*[23]

[23]In *Callahan v. Martin*, 3 Cal. 2d 110, 43 P. 2d 788 (1935), the California Supreme Court said:

> "The question to be determined in the instant case is as to the nature of the rights of the purchaser of the oil royalty interest." (loc. cit., p. 791).

Defendant Martin had been conveyed by deed from the landowner "3% of all oil, gas and other hydrocarbon substances" in a tract of land then under an oil and gas lease. Grantor in that deed afterwards

conveyed to plaintiff's predecessor in title his interest subject to "conditions, restrictions, reservations, easements, rights and rights of way of record." After the original lease had terminated and a new lease had been granted, plaintiff brought suit to quiet title, claiming that the conveyance to defendant expired with the original lease. The court held:

> "The assignments of oil royalty to the defendants Martin herein by plaintiff Callahan's predecessors in ownership of the general estate in the land, vested in the Martins an estate in real property described in plaintiff's complaint, and the recordation of the assignment charged plaintiff with constructive notice thereof."

Such holding was that a deed to California oil and gas royalty conveys a perpetual interest in real estate, though not an interest in the oil and gas in place.

Callahan has no application here because (1) each of the parties in that case claimed an interest in the land, one under a royalty deed and the other under a deed to the fee, and (2) there the claim was upon privity of estate, but here it is based on privity of contract and the owner of the estate is not a party.

In the tax case, *County of Los Angeles* v. *Continental Corp.*, 113 Cal App. 2d 207, 248 P. 2d 137 (1952), the County sued to establish that the rights of Continental under a contract with Los Angeles County Flood Control District, the owner of the land, granting Continental exclusive right to drill for and produce oil and containing "substantially all of the provisions usually found in the form of oil and gas lease customarily employed in this area" constituted "an oil or gas lease or vests in the defendant a possessory interest in real property subject to taxation." The court held: "The court is satisfied that the interests vested in the defendant thereunder are clearly comprehended by Section 107 of the Revenue and Taxation Code and are properly taxable thereunder." This holding answered the only issue posed by that court (op., p. 163).

This tax case is inapplicable here because the court found that the contract examined was under its terms in substance and effect an *ordinary oil and gas lease* which conferred *possessory* rights requisite to the application of that particular taxing statute.

In *Recovery Oil Co.* v. *Van Acker*, 79 Cal. App. 2d 639, 180 P. 2d 436 (1947), the assignee of an oil and gas lease on government lands sought to quiet his title against an assignment by his predecessor of "the proceeds from 15% of the oil, gas and other hydrocarbon substances produced, saved and sold . . . until such time as said assignee shall have received the sum of $20,000.00." The plaintiff had his assignment with notice, and the court held that such assignment was binding upon plaintiff. In the later appeal of same case, *Recovery Oil Co.* v. *Van Acker*, 96 Cal. App. 2d 909, 216 P. 2d 483 (1950), the court affirmed its previous holding and said: "Any obligation to pay was not only a continuing one but she (the owner of the oil payment had an interest in land which did not terminate until she actually received that amount of money."

Van Acker has no application because (1) defendant as owner of

an oil payment was claiming an interest in land and (2) was relying upon privity of estate and not privity of contract.

In *Schiffman* v. *Richfield Oil Co. of California*, 8 Cal. 2d 211, 64 P. 2d 1081 (1937), defendant's predecessor, while the owner of an oil and gas lease, had "assigned to plaintiff stated percentages of the proceeds to be 'derived and received . . . from the sale or other disposal of sixty-six and two-thirds (66-2 3) percent of the net production' " from an oil well after payment of expenses. Plaintiff sued defendant as the assignee of such lease for an accounting. Defendant contended that plaintiff's assignment created only a personal obligation and did not give plaintiff any interest in the oil produced after his grantor had assigned the lease. Plaintiff contended that his interest amounted to an interest in the leasehold estate under *Callahan* v. *Martin*, but the court expressly declined to determine whether or not plaintiff had an interest in the leasehold estate and instead "assumed for purposes of this decision that plaintiff does *not* have an interest in the leasehold estate as such" (loc. cit., p. 1088) and decided on equitable principles that defendant, taking the lease with notice, was bound.

The Supreme Court in *Shiffman* affirmed the judgment of the trial court but struck out the findings made below that the plaintiff had an interest in the leasehold estate or in the oil produced prior to sale.

In *Taylor* v. *Taylor*, 167 Cal. App. 2d 120, 334 P. 2d 201 (1959), as a result of a prior controversy on lease development the earlier lessee quitclaimed to lessors his interest in the undeveloped portions of the lease in consideration for "5% of the proceeds, less the pro rata share of the operating costs, hereafter realized from the sale of all oil and gas produced and saved from the first two wells" that might be thereafter drilled. Wholly foreign to any issue here, the question before the court was whether the receiver of a partnership, which later drilled the two wells, was entitled to sell such 5% interest as a part of the partnership assets. In *Taylor* the interest asserted was in the proceeds *as such*, and privity of estate was claimed.

In *Chase* v. *Trimble*, 69 Cal. App. 2d 44, 158 P. 2d 247 (1945), the court was not called upon to consider, nor did it discuss, the effect of the only language quoted in the petition (p. 13), which was the royalty provision in the oil and gas lease. The sole question presented was whether or not a reservation of an overriding royalty in a later assignment by lessee survived the still later quitclaim of the leasehold. The court held: "Appellants' overriding royalty interest, not entitling them to co-tenancy and limited, as it was, to the duration of the lease, expired when their assignee executed and delivered the quitclaim to the landowner-lessor."

La Laguna Ranch Co. v. *Dodge*, 18 Cal. 2d 132, 114 P. 2d 351 (1941), is only different from *Chase* in that the overriding royalty was there carved out and sold and assigned by the lessee, whereas in *Chase* it was reserved by the lessee in the course of assigning the working interest. Both were actions by the landowner to quiet title against the owner of the overriding royalty after the oil and gas lease had been quit-claimed, and in each the decision of the court was that the overriding royalty interest had terminated with the lease. The language

Obvious distinctions in the claims asserted and character of instrument examined render such cases inapplicable here. Again recalling that the question of jurisdiction over subject matter is determined by the scope of the claim asserted even though the instrument relied on may confer additional rights not asked to be enforced, it is a complete answer to say that in none of such California cases was the claim one to enforce as against petitioner, a stranger to the title, only its promise to pay money in an amount equal to and measured by another's future receipts.

Despite this, in order to meet head-on petitioner's assertions concerning the full scope and character of contract rights conferred on promisees in the instant case, we have gone on to distinguish its cases to show that in none of them was the court construing contracts like ours, and that in none of them was it decided that such a contract conferred on promisees an interest in land.

A reading of petitioner's cases (analyzed and distinguished in the footnote) will exhibit that the California courts have treated with discrimination the facts in each case presented and limited their holdings precisely to the issues as joined, and that contrary to petitioner's assertions none of such holdings conflict with the holdings of the courts below in the instant case.

quoted out of factual context in the petition (p. 13) in *La Laguna* appears in the court's comparison of the rights created under a grant of an overriding royalty by a lessee with those under a grant of a royalty by the landowner and conclusion that the rent analogy was applicable to the lessor's royalty but inapplicable where the operating lessee later grants an override.

Chase and *La Laguna* have no application here. In each of such suits by the landowner to quiet title the defendant holders of the override relied upon privity of estate, and the court held that such privity had terminated with the lease.

Holdings of Courts Below That the Rights Asserted by Respondents against Petitioner In this Suit Were of a Personal Nature and Not for an Interest in Land Are Consistent With and Supported by the Holdings of Both the California Courts and Elsewhere

There are precise holdings by the courts of California and elsewhere in which it has been held that *contracts containing promissory language like that found in the 1943 contracts*, viz., a promise to pay "an amount equivalent to" receipts, proceeds or profits, creates only a general obligation to pay money to the promisee as a creditor. This is held true even in a suit brought against the one in possession of and claiming ownership of the proceeds or fund comprising the yardstick. Respondents' contract rights here sought to be enforced have been held *not* to create any interest in land or in proceeds or profits as such, in the following cases: *In re Broome's Estate*, 166 Cal. App. 2d 488, 333 P. 2d 723 (1958); *Bullen v. De Bretteville*, 239 F. 2d 824 (9th Cir., 1956); *Byrd-Frost, Inc. v. Elder*, 93 F. 2d 30 (5th Cir., 1937), *cert denied*, 303 U. S. 647 (1938); and *Fechteler et al. v. Palm Bros. & Co.*, 133 F. 462 (1904).[24]

[24] *In re Broome's Estate*, 166 Cal. App. 2d 488, 333 P. 2d 723 (1958) involved a covenant in a deed in which the grantee had agreed to "*account for and pay* to said parties of the first part (the grantor) *an amount equivalent to* one-half (1/2) of all the royalties or other compensation which may become payable to or be received by or for the account of the grantee, its successors or assigns, for any oil, gas, etc. which might be developed on the California lands specified. The grantor in that deed died and by the terms of his will left all of his "interest in real property" to his daughters and the rest of his estate to a trust under which his wife was the income beneficiary for her life. This appeal was from an order settling the report of the trustees of the estate, and the adverse claimants were the daughters claiming the real estate and the widow claiming the personal property, and the issue was "whether or not a real property right was excepted and reserved in favor of the grantors in the original deed" and "whether

or not a personal right was reserved in favor of the grantors in said deed." The court considered the California cases, including *Callahan v. Martin*, supra, which held that a royalty was an interest in land, but then pointed out that the grantor in the instant case had vested in the grantee the full leasing rights "requiring the grantee to agree to pay to grantors, their successors and assigns, an amount equivalent to one-half of whatever might be received for any oil . . . So viewed, the obligation to pay is in the nature of a perpetual *contractual* obligation imposed upon the owner of the land by reason of the ownership thereof." The court held that the moneys paid and to be paid under such personal covenant passed under the will of the decedent grantor as personal property rather than as an interest in real estate, and that such covenant created no interest in the realty.

Bullen v. De Bretteville, 239 F. 2d 824 (9th Cir., 1956), was a case for distribution of funds paid into court upon the condemnation of land by the United States in a prior case, and in this last case the only question that remained was between the private claimants to the fund. Since the funds stood in lieu of the real property interests condemned by the U. S., the court was called on to determine whether each claim presented constituted an interest in the real estate or was secured by a lien. Appellants Bullen and Hayward had each advanced $2,500.00 for the drilling of a well under a letter providing that they were to receive "one percent (1%) participating royalties, and (by the terms of a 'two for one agreement' combined therein) receive double their investment, or $5,000.00 each, 'out of the 1st 15% of production from the well'." Trial Judge Yankwich had sustained appellants' claim to the 1% participating royalty, but had denied their claim for $5,000.00 each on the ground that the "two for one agreement" "created only a personal obligation", was not specifically enforceable out of obligors' royalty interests, and was therefore barred by the four year statute of limitations. (239 F. 2d at 828).

In affirming, the 9th Circuit considered the question determinative of appellants' claim to $5,000 each to be: "Was the $10,000 a personal obligation to pay or was the promise secured?" (*Id.*, 830, ¶ 10)

Appellants contended first that the California cases (*Callahan v. Martin, Schiffman v. Richfield*, and *Recovery Oil Co. v. Van Acker*, also cited by petitioner in the instant case) were controlling, but the court pointed out that they were inapplicable because they involved "factual situations where an actual assignment existed, either outright or as security, or where an equitable lien had been created."

Appellants next contended that the contract should be regarded as an agreement to assign, and as such would create a legal interest in oil rights. The court rejected this contention, saying that here there was but an indefinite reference to documents which might be drawn in the future, and that this was not "the sort of agreement where all the necessary terms are agreed upon and all that remains is the execution of a written memorial." (*Id.*, 831)

Appellants further contended that even if the document is merely an agreement "which did not pass present title, it would, nevertheless create rights in the property which would be enforceable in a court of equity." The court rejected this argument, saying:

"The instant case concerns the *rights* of a contracting party, not the *duties* of an assignee. * * *

"Appellants make one final valiant effort. They urge that

'under the decisions where money is to be paid with funds "arising from" the production of land, or is to be "paid out" of such production * * * the document, *as a matter of law*, is to be interpreted as giving a security interest in the land and the production therefrom.

We cannot agree." *(Ibid.)*

later noting that:

"There must be something more than a contract which has been breached before a court can impress an equitable lien upon a specific fund." (*Ibid.*, ¶ 12)

The court then held:

"We conclude that the promise to pay was personal only."

and that, since it agreed with the trial court that the "two for one agreement" was "a mere personal covenant," the complaint was barred by limitations. (*Id.*, 832).

In *Byrd-Frost, Inc. v. Elder*, 93 F. 2d 30 (5th Cir., Tex., 1937), *cert. denied*, 303 U. S. 647 (1938), the court was called upon to distinguish between a personal obligation to pay money and an assignment of proceeds as such. At a time when Byrd-Frost and Elder were in pending litigation, each adversely claiming title to an interest in certain minerals, both conveyed their interest to Mazda Oil Co. and executed an agreement whereby Byrd-Frost would collect the royalties from Mazda and, should Elder be adjudged owner of said interest, Byrd-Frost would pay a "*sum equal to the amount of money collected*" to Elder. Elder won the suit and demand was made by him on Byrd-Frost for payment of a sum equal to the amounts received by it, which was refused.

Thereafter, a stranger to the previous litigation, Miller, instituted trespass to try title in a state court against both Byrd-Frost and Elder and obtained a temporary injunction restraining Byrd-Frost from disposing of any of the moneys in its hands arising from the production of oil from the tract. Elder then sued Byrd-Frost in the Federal Court to enforce its previously described contractual obligation to pay, and Byrd-Frost pleaded in abatement, asserting pendency of the Miller suit and existing injunction against it. Such plea, as well as a motion to stay, was overruled, and the judgment was for Elder and his grantees for the sum demanded.

On appeal Byrd-Frost contended that the state court in the Miller suit had possession of the *res*, viz., the fund, under the injunction and that because its jurisdiction was prior to that of the Federal Court the later proceedings should be stayed. The 5th Circuit was thus required to determine the nature of Elder's claim in the later suit in the Federal Court against Byrd-Frost, that is, whether or not such suit was for the *res* – the fund – in the possession of the state court. The court

observed:

> "The agreement rests entirely upon the promise *in personam* of Byrd-Frost to be 'bound and obligated' for a sum of money 'equal to' the amount collected by it. It is upon this personal obligation that plaintiffs here sue. They seek to recover, not a specific fund, but a general money judgment. The character of the suit is not altered by the fact that Byrd-Frost voluntarily segregated the moneys in a separate fund." (93 F. 2d at 32, ¶ 3)

The court then held:

> "This suit is not brought to recover, and does not involve the title to, land nor to any identifiable fund or other res. The only matter here at issue is the personal liability of Byrd-Frost on its obligation above quoted. Only a general money judgment is sought. The suit is therefore in personam. Pendency of the state court suit is no ground for abatement or stay." (93 F. 2d at 32-3).

In *Fechteler et al. v. Palm Bros. & Co.*, 133 F. 462 (1904), an old case from Ohio, the 6th Circuit had to decide whether or not a written agreement to pay a sum of money "*equal to,*" that is, measured by, a certain proportion of the gross profits or proceeds conferred on the promisee the right to participate in such profits or proceeds as such, or whether the right created was only that of a creditor. The firm of Palm, Fechteler & Co., a New York partnership, sued Palm Bros. & Co., an Ohio corporation, for an accounting under a written contract made by them in which each had agreed to sell to and supply the other on order at cost certain goods in which they respectively dealt, and at year's end each agreed to pay to the other "*a sum of money equal to a 'specified percent' of the total and entire gross profits* made and realized during the whole year next preceding . . . out of its entire business . . . including profits made by its branch houses." In the bill it was charged that defendant Ohio corporation had failed to pay on one of its branches. A demurrer was sustained below, and the bill dismissed.

Complainant appealed, and the 6th Circuit reversed with directions for an answer. After first holding that such suit for accounting presented a case for equity consideration, the court then disposed of the defense that such contract created a partnership, ultra vires as to the Ohio corporation. The court being called on to construe the contract and to determine what legal rights it conferred on each party in order to decide whether the engagement resulted in a partnership, after first stating that "the person sought to be charged as a partner must have an interest in profits *as profits*," but that:

> ". . . it has always been the rule that if you could show that the participation in profits was not a sharing in profits as a principal – in profits as profits of a joint business – but under an agreement by which a sum was to be received which should be equal to a definite proportion of the profits as a compensation for services or rent, or money advanced as a loan, there will be no liability as a partner. Such an arrangement would contradict the notion of a partnership, for there would be no participation in profits as a principal, no receipt of profits as profits. Upon the contrary, the relation of creditor would be made out; the amount

The principle that "ordinarily a promise to pay an obligation out of the proceeds of a specific fund is not a present assignment of any portion of the fund" was recognized by the California court in *In re Henshaw's Estate*, 68 Cal. App. 2d 627, 157 P. 2d 390 (1945). In considering whether the particular instrument before it did constitute such an assignment, the court said:

> "It is uniformly held that a contract of this nature is open to construction and interpretation just like any other contract."

and affirmed the trial court's finding "that the parties intended to make an assignment of appellant's beneficial interest, and to create an equitable lien thereon to the extent of respondent's claim." In the instant case, the findings of the court below that it was the *intention* of the parties to the 1943 contracts that respondents agreed to and did surrender all of their former rights and titles in return for a mere personal covenant to pay money forecloses the inquiry. That the *intention* of the parties is controlling and the question of whether those contracting *intended* to create only a personal obligation to pay money or to confer

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of the debt being a sum of money estimated by a certain proportion of the profits, as a mere measure or yardstick." (loc. cit., op., p. 469).

The court again emphasized this distinction later in the opinion, saying:

> "Thus, though there is to be a sharing in gross profits, it is not to be a participation in profits, as profits . . . It is an agreement to pay, not to divide as principals would do, but to pay a sum of money 'equal to' (that is, measured or estimated by) a certain proportion of the gross profits. It is evident from these considerations that the character in which the one party would receive a proportion of the gross profits realized from the other would be that of a creditor, rather than that of a principal trader." (*Id.*, p. 470).

an interest in the land, lease or proceeds is a question of fact to be determined by the lower courts, as well as one of law, has been expressly recognized in *Schiffman* (loc. cit., 64 P. 2d 1088, par. 9) and in *La Laguna* (loc. cit., 114 P. 2d 354, par. 9-11).

In conclusion, it should be said that cases in the petition (p. 15) cited principally from the 5th Circuit on Fox Realty being an indispensable party are clearly distinguished by the opinion of the same Circuit in *Estes v. Shell Oil Co.*, 234 F. 2d 847 (1956), where it said in distinguishing *Keegan* (cited by petitioner):

> "The situation here is entirely different from that involved in those cases. No mention is made either in the body of the complaint or in the prayer of cancellation, reformation or other action with respect to any written instrument or any muniment of title. The sole prayer is for a money judgment and for injunctive relief as auxiliary thereto."

In all of petitioner's cases, as in *Estes*, the courts recognize a distinction between cases "seeking directly to cancel, establish or affect directly title to lands or interests therein" and cases merely seeking a personal judgment requiring the payment of money.

In conclusion, we agree with the "Statement" of petitioner (p. 11) that "the law of California is clear" and say that its courts have been careful and precise. It is a complaint in the petition that the Court of Appeals did not discuss the California cases but its opinion exhibits that it carefully examined the California decisions (286 F. 2d at 376-7) and in passing on the jurisdiction and party issue expressly noticed

four cases cited by petitioner and one by respondents (*Id.Op.* p. 379, footnote 5).

If, as petitioner contends, the decisions of California had so plainly declared that a promise such as contained in these contracts created an interest in land, it is passing strange that Alfred Wright, who had helped draw such contracts, advised Clay that the interests that were reflected by these contracts were not royalties or mineral interests, and that the interest was merely contractural (Clay dep. p. 113), and that Clay reached the same conclusion (*Id.* p. 114-5. See also R. 1420-21 and 1433 where portions of Clay dep. read into the record *by petitioner*), and it is quite apparent that if Clay had thought otherwise he (as Universal's general counsel) would have required promisees' joinder in the lease to Universal or at least have taken the matter up with them.

Also, finally conclusive on the intention of such parties to effect a complete surrender by promisees of their former rights and interests in the lands and minerals and to substitute any return only a personal promise to pay money, is the fact that the parties in drafting the final contracts were careful to employ language and to require the contemporaneous execution and delivery of releases and assignments to effect such a complete surrender. Then rendering unmistakable such intention, it was provided that such personal covenants would expire when and if the landowner should thereafter execute and deliver a deed to such promisees, their successors or assigns, in a prescribed form under which there would then have been invested in grantee an interest in the minerals, but this was never done.

Argument in Support of Court of Appeals' Affirmance of the Action of Trial Court Denying Petitioner's Motion to Transfer

Petitioner asks this Court to exercise its supervisory jurisdiction over the lower courts asserting that it would be in the interest of justice to set aside the judgments of the lower courts on the merits and to order this case transferred for another trial in the Southern District of California.

But in seeking this writ petitioner does not assert that the judgments entered on the merits of the case by the courts below were wrong or that a different result would have been reached had the case been tried on the merits elsewhere. Petitioner does not say nor has it attempted to show that the case was not fairly tried or that it was in the Texas trial denied opportunity to develop all of its defenses and contentions or that it suffered any prejudice in the forum. It is not shown in the petition that in trial below petitioner was deprived of the right to present any testimony material and relevant to the issues in the case or of an opportunity to fully present any documentary evidence it desired.

In a case like this one where the evidence relied upon by the movant was strongly contradicted and substantially impeached and the trial judge has resolved all factual disputes against movant, will this Court now entertain jurisdiction to once again examine such a factual dispute? A negative answer is indicated under holdings like *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, where at p.

275 it was said:

> "A court of law, such as this is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. (citing cases)."

In a California case in which the trial court had granted motion to transfer under 1404(a) after resolving a fact dispute in affidavits, justification for such a course of action was made in the following language:

> "Unless the right to choose between conflicting facts or assertions exists, the court could never determine a motion under this section *on the facts.*" *U.S. v. National City Lines*, 80 F. Supp. 734, 744, (S.D. Cal. 1948), *cert denied* with an opinion by Vinson, C.J., 337 U.S. 78 (1948). (Italics by the court).

Petitioner wants to apply the holdings of this Court in *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955) to the instant case in such a way as to remove all burden on a defendant seeking transfer and deprive a plaintiff in a diversity action of his choice of forum and in effect confer the choice on defendant. But as pointed out by this Court, although 1404(a) has permitted courts to grant transfers "upon a lesser showing of inconvenience", this Court was careful to add that:

> "This is not to say that the relevant factors have changed or that plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

Despite the tenor of petitioner's argument, we respectfully say in the language of 1 *Moore Fed. Practice*, paragraph 0.145 (6.-1, p. 1787:

> "The burden of establishing that there should be a transfer, however, remains after 1404(a) upon the moving party, who must still make a convincing showing of the right to a transfer."

The *Norwood* decision only reconfirms that the trial court is still invested with "discretion" and when such a motion is filed is called upon to exercise it on the basis of the facts before him. When such facts are in dispute it remains the function and unavoidable duty of the trial court to resolve such dispute and determine the *facts* and such a court may not fairly be subjected to a charge of arbitrary action by the party against whom disputed facts have been resolved.

When this Court said in *Norwood* that the relevant factors had not changed or that plaintiff's choice of forum is not to be considered, it had previously considered *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and was referring to those factors held relevant including plaintiff's choice of forum as recognized in *Gilbert* and qualified since *Norwood* only to the extent of investing a broader discretion in the trial court so as to permit its grant of transfers upon some "lesser showing of inconvenience".

As has been demonstrated in our earlier statement from the record, a patient trial court in the instant case in conducting a lengthy hearing in order that disputed facts might be resolved, heard evidence on and considered all factors still relevant and to be considered under *Norwood*. The Court of Appeals with

such a record made in accordance with the accepted and usual course of judicial proceedings before it carefully considered the matter and declared it found no indication in the record that the trial court had abused its discretion.

Congress, having opened the federal courts to suitors in diversity cases involving the requisite jurisdictional amount, a plaintiff is not to be lightly deprived of his choice of forum. An occasion may arise where normal appropriate venue may operate "vexatiously" but this must be proved as any other *fact*, and where the facts are in dispute the resolution of such a dispute is a function of the trial court having the opportunity of hearing the witnesses, observing their demeanor and determining their credibility. Absent such a showing the parties are entitled to an adjudication of their rights in the tribunals which Congress has empowered to act. Under the record here, it was determined in a normal judicial way that as a matter of *fact* a trial in Texas would not operate vexatiously on petitioner or impose needless hardship. The later trial on the merits confirmed that.

Although the burden was on movant to prove otherwise, as shown in our previous statement from the record made of the hearing on motion to transfer, any idea that the suit as filed in Texas as a matter of "forum shopping" has been dissipated. Aside from other valid reasons shown, such choice was finally made after respondents' attorneys determined from investigation that a trial and disposition in Texas could be secured without unreasonable or unnecessary delay, and that such was not true in the Southern District of California and the same conditions would

at' nd any appeal. Petitioner says there was no hurry, bu. respondent Dr. Edwin Janss, after attending the trial, is shown by the record to have died before the judgment could be entered. It was affirmatively shown that this Delaware corporation having its principal place of business in New York would be subjected to no unreasonable expense and that respondents tendered payment of the expenses of petitioner's only "key" witness, Metzler, and to cover the cost of copying.

It is said by petitioner that the Texas courts and the 5th Circuit are not familiar with California law, but, as is apparent in cases earlier cited, both the Texas courts' and the 5th Circuit's opinions are replete with references to California decisions, and vice versa. It has not been shown and cannot be seriously contended that the contract law of California is either unique or substantially different from the contract law in Texas and elsewhere. It is not asserted in the petition that the courts below in acting on the merits did not construe and interpret the contracts according to the California decisions on the construction and interpretation of a contract to pay money although the contention is made on the jurisdiction issue that under the authorities in the California cases such contracts also conferred rights upon promisees constituting an interest in land, which has been previously answered.

It is again emphasized that the defendant below was *not* the landowner.

Petitioner cites and relies on personal injury cases in which a defendant has been called upon to try a case far from the place of the tort. Petitioner declines

to acknowledge the obvious distinctions between such a case and an action based on a breach of written contract (noted in *Marks v. Fireman's Fund Ins. Co.*, 109 F. Supp. 800, 803 [S.D.N.Y., 1953]) which was to be tried by the court without a jury. Such a case might have been tried on depositions, but the record affirmatively shows that petitioner was not limited to depositions and that the only limitation on the number of witnesses imposed by the courts concerned expert testimony as to industry, custom and usage, and that such was imposed at petitioner's request over respondents' objection.

CONCLUSION

For the reasons advanced above, the petition for a writ of certiorari should be denied.

Respectively submitted,

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